

UNITED STATES NUCLEAR REGULATORY COMMISSION

ORIGINAL

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)

PUBLIC SERVICE COMPANY OF)
NEW HAMPSHIRE, et al.,)

(SEABROOK STATION, UNITS 1 AND 2))

) Docket Nos.

) 50-443-OL

) 50-444-OL

) OFF-SITE EMERGENCY

) PLANNING

EVIDENTIARY HEARING

Pages: 20877 through 20981

Place: Boston, Massachusetts

Date: April 28, 1989

TR.01
0/1

ADD: MARGORIE NORDLINGER

HERITAGE REPORTING CORPORATION

Official Reporters

1220 L Street, N.W., Suite 600

Washington, D.C. 20005

(202) 628-4888

8905010230 890428
PDR ADOCK 05000443
T PIC

UNITED STATES NUCLEAR REGULATORY COMMISSION
 ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
)	Docket Nos.
PUBLIC SERVICE COMPANY OF)	50-443-OL
NEW HAMPSHIRE, et al.,)	50-444-OL
)	OFF-SITE EMERGENCY
(SEABROOK STATION, UNITS 1 AND 2))	PLANNING

EVIDENTIARY HEARING

Friday,
 April 28, 1989

Auditorium
 Thomas P. O'Neill, Jr.
 Federal Building
 10 Causeway Street
 Boston, Massachusetts

The above-entitled matter came on for hearing,
 pursuant to notice, at 8:28 a.m.

BEFORE: JUDGE IVAN W. SMITH, CHAIRMAN
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE KENNETH A. MCCOLLOM, Member
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE RICHARD F. COLE, MEMBER
 Atomic Safety and Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

APPEARANCES:

For the Applicant:

THOMAS G. DIGNAN, JR., ESQ.
GEORGE H. LEWALD, ESQ.
KATHRYN A. SELLECK, ESQ.
JAY BRADFORD SMITH, ESQ.
JEFFREY P. TROUT, ESQ.
GEOFFREY C. COOK, ESQ.
Ropes & Gray
One International Place
Boston, Massachusetts 02110-2624

For the NRC Staff:

SHERWIN E. TURK, ESQ.
ELAINE I. CHAN, ESQ.
EDWIN J. REIS, ESQ.
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

For the Federal Emergency Management Agency:

H. JOSEPH FLYNN, ESQ.
LINDA HUBER McPHETERS, ESQ.
Federal Emergency Management Agency
500 C Street, S.W.
Washington, D.C. 20472

For the Commonwealth of Massachusetts:

JAMES M. SHANNON, ATTY. GEN.
JOHN C. TRAFICONTE, ASST. ATTY. GEN.
ALLAN R. FIERCE, ASST. ATTY. GEN.
PAMELA TALBOT, ASST. ATTY. GEN.
MATTHEW BROCK, ESQ.
LESLIE B. GREER, ESQ.
Commonwealth of Massachusetts
One Ashburton Place, 19th Floor
Boston, Massachusetts 02108

APPEARANCES: (Continued)

For the State of New Hampshire:

GEOFFREY M. HUNTINGTON, ASST. ATTY. GEN.
State of New Hampshire
25 Capitol Street
Concord, New Hampshire 03301

For the Seacoast Anti-Pollution League:

ROBERT A. BACKUS, ESQ.
Backus, Meyer & Solomon
116 Lowell Street
P.O. Box 516
Manchester, New Hampshire 03105

JANE DOUGHTY, Director
Seacoast Anti-Pollution League
5 Market Street
Portsmouth, New Hampshire 03801

For the Town of Amesbury:

BARBARA J. SAINT ANDRE, ESQ.
Kopelman and Paige, P.C.
77 Franklin Street
Boston, Massachusetts

WILLIAM LORD
Town Hall
Amesbury, Massachusetts 10913

For the City of Haverhill and Town of Merrimac:

ASHOD N. AMIRIAN, ESQ.
P. O. Box 38
Bradford, Massachusetts 01835

For the City of Newburyport:

BARBARA J. SAINT ANDRE, ESQ.
JANE O'MALLEY, ESQ.
Kopelman and Paige, P.C.
77 Franklin Street
Boston, Massachusetts 02110

APPEARANCES: (Continued)

For the Town of Newbury:

R. SCOTT HILL-WHILTON, ESQ.
Lagoulis, Clark, Hill-Whilton & McGuire
79 State Street
Newburyport, Massachusetts 01950

For the Town of Salisbury:

CHARLES P. GRAHAM, ESQ.
Murphy and Graham
33 Low Street
Newburyport, Massachusetts 01950

For the Town of West Newbury:

JUDITH H. MIZNER, ESQ.
Second Floor
79 State Street
Newburyport, Massachusetts 01950

For the Atomic Safety and Licensing Board:

ROBERT R. PIERCE, ESQUIRE
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

I N D E XWITNESSES:DIRECT CROSS REDIRECT RECROSS DIRE

VOIR

PANEL No 6:

Anthony M. Callendrello

Michael C. Sinclair

Dennis S. Miletì

by Mr. Lewald

by Mr. Traficonte

by Ms. Talbot

by Mr. Traficonte

20950

20952

20978

20948

EXHIBITS:IDENT.REC.REJ.DESCRIPTION:

(No exhibits)

I N D E X

INSERTS:

PAGE

(No inserts)

(Sinclair)

P R O C E E D I N G S

1
2 JUDGE SMITH: Everyone is here. It's a little bit
3 early, but if you don't mind, we might as well proceed.

4 Is there any preliminary business?

5 MR. LEWALD: Your Honor, we have over the night
6 recess looked at the materials that were the subject of the
7 motion to strike by the Attorney General, and would like
8 this opportunity to report on it.

9 In an effort to be more sensitive to the subject
10 matter raised, and we don't have the benefit of, or didn't
11 have the benefit of the transcript until now, and we are
12 relying on our notes as to what the subject matter of the
13 motion was.

14 The first one that we have marked is the last
15 - paragraph on page 2 of the prefiled testimony, Applicants'
16 Rebuttal No. 6. And our position is that the matters that
17 are contained in that paragraph ought to stay. The concern,
18 or the objection was that the testimony contains and
19 examines the means. And the means is what we understood is
20 sought to be excluded. But the means goes to facilities as
21 well as the rest of the items contained, and the testimony
22 is used to identify these facilities as well. So we see no
23 reason or purpose of striking that.

24 On page 3, we understand that the objection here
25 is to the second paragraph and the third sentence which

1 begins, "It includes the results of the 1987 special needs
2 survey," and runs to the end of that paragraph.

3 We see nothing involving methodology in that
4 sentence. It is simply stating the result.

5 MR. TRAFICONTE: I'm sorry to interrupt, Your
6 Honor, but I thought Mr. Lewald was going to make an offer
7 essentially to withdraw.

8 MR. LEWALD: I am.

9 MR. TRAFICONTE: Oh, okay.

10 MR. LEWALD: If you will just be patient.

11 MR. TRAFICONTE: All right. It's hard.

12 MR. LEWALD: On page 8, which we understand the
13 next objection to be on, under the heading "Special Needs
14 Population", we would strike in that paragraph the
15 following. Now, I will first read, the paragraph begins,
16 "The listing of special needs population found in Appendix M
17 of SPMC based on the results of a mail survey conducted."

18 And we would strike after "conducted", the
19 following, "of all households in Massachusetts EPZ by
20 International Survey Research Corporation, Chicago,
21 Illinois."

22 Then we would leave in the text the following,
23 "Between June and September 1987 and a subsequent
24 verification effort conducted by NHY emergency planners in
25 May 1988," and we would strike the remainder of that

1 paragraph.

2 On page 9, we would strike the entire page.

3 JUDGE COLE: Mr. Lewald, on page 8, does that
4 strike the reference at the end also on page 8?

5 MR. LEWALD: We would strike the reference to the
6 end also.

7 JUDGE COLE: All right.

8 MR. LEWALD: On page 9, we would strike the entire
9 page.

10 On page 10, we would strike all the materials
11 except what appears on the last three lines following the
12 word "addition". We would initial cap the word "letters"
13 and leave in the testimony, "Letters and posters were sent
14 to approximately 380 state and regional service and
15 - "handicapped advocacy groups, informing them of the survey",
16 which appears on the next page, and asking that they in turn
17 encourage their clients to respond to the survey.

18 On page 11, we would strike the second full
19 paragraph on that page.

20 MS. CHAN: Mr. Lewald, does that affect your
21 attachments also?

22 MR. LEWALD: I beg your pardon?

23 MS. CHAN: Does that affect your Attachments B and
24 C referred to in the statement?

25 MR. LEWALD: That would come out.

1 Oh, no, no, it isn't. Attachment B and C.

2 JUDGE COLE: That's the first full paragraph.

3 That's not the one --

4 MR. LEWALD: That's the first full paragraph. We
5 would strike the second full paragraph.

6 And on page 15 with respect to the objections
7 raised to the second full paragraph on that page, we would
8 strike the following words that appear in the first sentence
9 of the second full paragraphs, and the words would be "using
10 methods similar to those employed for the original survey".
11 So that the sentence will now read, "The response to the
12 special emergency health form will be verified by personal
13 contact and the results incorporated in the next revision to
14 the SPMC."

15 -- I would say, in general, that the matters that
16 concern the verification and the activity in connection with
17 the verification is testimony that would reach the testimony
18 that was submitted by Sharon Moriearty on Contention 49.
19 And that particular aspect of the testimony is the need for
20 individualized assessment. The verification was all
21 directed to that, to communicating with the individual
22 respondents to the surveys and determining whether they are
23 really in need of the assistance; and secondly, the nature
24 of the need.

25 MS. TALBOT: Should I respond, Your Honor?

1 JUDGE SMITH: Is that all?

2 MR. LEWALD: That's all, Your Honor. I believe
3 that there were no motions or aspects of the motion
4 following page -- well, following page 16, and I just
5 addressed why we are not responding to the motion to strike
6 the last paragraph on page 16 and the carryover to page 17,
7 because that involved directly the testimony of Sharon
8 Moriearty or a response to it.

9 JUDGE SMITH: How about on page 17 where you
10 state, the first full paragraph, second sentence where you
11 say, "The needs code classification is based upon questions
12 contained on the special needs survey verification form
13 which addresses specific circumstances of an individual
14 being contacted", et cetera, and the rest of that?

15 Is the needs survey verification form, was that
16 challenged by Dr. Dillman in that testimony?

17 MS. TALBOT: It was challenged by Ms. Moriearty in
18 JI-48 testimony, Your Honor.

19 JUDGE SMITH: In JI-48 testimony.

20 MS. TALBOT: Right.

21 MR. LEWALD: It was challenged in 49.

22 JUDGE SMITH: Also. Also.

23 MS. TALBOT: Your Honor, I would like a minute to
24 just review the testimony. But my recollection, and I
25 worked very closely with the experts on this, is that JI-49

1 does not directly bear on verification processes used in the
2 SPMC. Indeed, Sharon Moriearty takes issue with this very
3 process and goes on in great detail about it in JI-48.

4 JUDGE SMITH: Well, what did she say? Can you be
5 more specific as to what Ms. Moriearty said in 49 that --

6 MR. LEWALD: Well, I'm looking at -- well, on page
7 17, for instance, in the needs code, I'm looking at page 29
8 of the testimony. And it says, "In your opinion, does the
9 needs code in Appendix M render to the reader enough
10 information?"

11 "No, absolutely not". Then she goes on for the
12 rest of the page.

13 JUDGE COLE: That's Ms. Moriearty's testimony on
14 JI-49?

15 MR. LEWALD: On JI-49, yes, sir.

16 MS. TALBOT: Your Honor, I think the needs
17 assessment is one thing, but the special needs survey
18 verification is another thing. And the language that Your
19 Honor cited to on page 17 talks about really the
20 verification process that was used.

21 (Pause to review document.)

22 JUDGE SMITH: Where does Ms. Moriearty address the
23 adequacy of the needs code in the Contention 48 testimony?

24 (Pause to review document.)

25 JUDGE SMITH: Her testimony primarily along that

1 line is that whatever the needs are, they have not been
2 identified in the survey as compared to the validity of the
3 needs code.

4 MS. TALBOT: In JI-49, Your Honor, Ms. Moriearty
5 takes issue with the manner of assessing needs for disabled
6 people. And in that sense, she does opine as to what she
7 perceived to be the inadequacy of the needs code.

8 JUDGE SMITH: Fine. That's in 49.

9 MS. TALBOT: Right.

10 JUDGE SMITH: And that testimony is in.

11 MS. TALBOT: Right. I guess it's hard to cut this
12 with a scalpel because of the verification process -- the
13 language on page 17 really goes to both matters. I really
14 can't give an easy answer.

15 - - JUDGE SMITH: Well, flipping through here, I have
16 not been able to find any place where Mr. Moriearty or
17 anybody specifically addresses the accuracy or the
18 sufficiency or validity, whatever it may be, of the needs
19 code.

20 MS. TALBOT: No, but the validity --

21 JUDGE SMITH: It's a separate issue.

22 MS. TALBOT: Right. But the validity of the
23 verification form has been expounded upon in great detail by
24 Dr. Dillman in JI-48.

25 JUDGE SMITH: But not in that respect. He didn't

1 challenge that aspect of it that I can find. I'm waiting
2 for you to point it out. I can't find where either of your
3 witnesses challenged that aspect of the survey. If they
4 did, I'm waiting for it. I just can't find it.

5 MS. TALBOT: Well, on page 22, Dr. Dillman takes
6 issue with the types of questions that were asked, 22 on to
7 23, the types of questions that were asked on the
8 verification form, and that gives rise to his opinion on 24
9 that the questions in the verification form and the way it
10 was conducted don't meet standards of professional and
11 accurate surveys. So, in a sense, the whole product of the
12 verification would be tainted if you were to buy Dr.
13 Dillman's argument.

14 JUDGE SMITH: He doesn't have any expertise on the
15 - precision of the needs code, and there is nothing that he
16 says on 22 that would foreclose, that I can see, if I
17 understand your point, which I'm not sure that I do.

18 He does say the goal is to identify the types and
19 degree of impairments necessitating assistance during an
20 emergency. He does say that. But that is it in its
21 entirety as far as I can see. It is Ms. Moriearty and her
22 testimony in Contention 49 who picks that point up. So
23 that's just an incidental thing. I don't think that helps
24 you any.

25 MS. TALBOT: Okay, just one more point, Your

1 Honor, and I'll let it go.

2 JUDGE SMITH: Well, no, I would like to hear from
3 you now to trace through -- you are not done arguing, are
4 you --

5 MS. TALBOT: No.

6 JUDGE SMITH: -- the whole point?

7 MS. TALBOT: Oh, no, just on this minor issue on
8 page 17 I have.

9 JUDGE SMITH: Okay.

10 MS. TALBOT: But I have many more points related
11 to other parts of the testimony.

12 On page 17, it says, "The needs code
13 classification is based upon questions which address the
14 specific circumstances of the individual being contacted."

15 -- I would just point out that it is the nature of
16 those very questions that gave rise to the statement by Dr.
17 Dillman that the verification process was flawed. In other
18 words, they don't really address specific circumstances of
19 the individual.

20 It gets back to the whole argument in the JI-48
21 testimony about diagnostic and functional classifications in
22 open-ended versus closed-ended questions. It really falls
23 right into that.

24 If you don't ask the right type of question at the
25 onset, you won't get the right type of result. I could ask

1 you, is this the fifth day that the Blue Angels haven't
2 flown over your house. And you will say, yes. But that
3 doesn't really give me anything to work with.

4 Similarly, according to Dr. Dillman and Sharon
5 Moriearty in JI-48, the types of questions that were
6 actually asked just were not designed to elicit accurate
7 information bearing on specific circumstances of the
8 individuals being contacted, i.e., what floor do you live
9 on, are there any handicapped egress entrances or exits from
10 your home, these type of questions; are you able to lift a
11 bag of groceries, can you walk five blocks.

12 The whole argument about the desirability of a
13 functional approach as opposed to what Dr. Dillman and
14 Sharon Moriearty consider to be a dated and no longer useful
15 approach in conducting these type of surveys is to ask
16 questions that will elicit the functional limitations of a
17 particular individual, not merely what kind of four-wheel
18 vehicle they need to get out of town.

19 (Pause to review document.)

20 JUDGE SMITH: We are looking under Appendix M for
21 what is meant by that paragraph on page 17. It's not clear
22 standing alone. It says, "The needs code classification is
23 based upon questions contained in the survey verification
24 form."

25 Well, the needs code classification, as I

1 understand it, is a generic classification and would apply
2 to any large population of impaired individuals. The people
3 who fit into the various classifications were identified in
4 the survey as I understand that paragraph.

5 If that's not what it means --

6 MR. LEWALD: The verification end of the survey?

7 JUDGE SMITH: What?

8 MR. LEWALD: In the verification aspect.

9 JUDGE SMITH: In the verification aspects of it.

10 So while Ms. Moriearty is talking about the need
11 for precise needs codes, Moriearty and Dillman talked about
12 however they may fit into however the population may be
13 classified under needs codes, they have not been identified
14 nor can the survey produce the information you need as I
15 understand it, the division between the two testimonies.

16 These needs codes, as far as I can see, would
17 apply to any community.

18 MR. LEWALD: Apply to anybody in that population.

19 JUDGE SMITH: In any population. You know, there
20 is nothing site-specific about the nature of the impairments
21 in the Massachusetts EPZ.

22 In any event, I do not understand what the
23 paragraph on page 17 is talking about. The only reading I
24 can give it which makes any sense is the two sets of
25 information were matched. One set of information were needs

1 codes which were developed, I don't know how. The other set
2 of information which would match to those needs codes were
3 the listings of individuals developed in the special needs
4 survey verification form.

5 First, you get your categories. Then you find out
6 the people and the information of the people. Then you line
7 them up with the categories.

8 Given that, if that is correct, isn't it true that
9 Dillman and Moriearty as a Panel criticize the survey's
10 ability to identify enough people and the particular needs
11 that they have?

12 MR. LEWALD: Well, they may have well done that.
13 But we're referring to Ms. Moriearty's testimony who also
14 attacks the needs code.

15 JUDGE SMITH: But her testimony standing alone I
16 don't recall as having -- well, let's take a break and let's
17 go read her testimony.

18 Would you please show us the part of her testimony
19 specifically by page number in which she is talking only
20 about needs codes and not talking about the coverage and
21 measurement errors which were in their contention on 48?

22 MR. LEWALD: Well, I would like to refer to page
23 29 of the testimony of Sharon Moriearty on behalf of the
24 Attorney General of the Commonwealth regarding J 49. And
25 it says, "In your opinion, does the needs code in Appendix M

1 render to the reader enough information?"

2 And then it's, "No, absolutely not."

3 As I said already, it may be that some residents
4 have singular and uncomplicated impairment and would only
5 need the special vehicle that is provided in Appendix M.
6 And it goes on for the rest on the page on that. And
7 similarly, it may be that disabled residents living with
8 others who are at home at the time of the incident who are
9 themselves knowledgeable about the disabled individual's
10 specific needs would also be well provided for with the
11 arrival of particular needs code vehicle. However, if your
12 goal is to ensure that all the special needs residents can
13 get out safely during an evacuation and if your goal is to
14 ensure that you can move the special needs residents as
15 - safely as possible, then you absolutely have to have more
16 information as to the nature of the circumstances.

17 "On this note, if the goal --

18 JUDGE SMITH: So in that respect she is apparently
19 blending her expert opinion as to what type of information
20 is needed together with a criticism that the survey did not
21 identify that information.

22 MR. LEWALD: That Appendix M does not give.

23 JUDGE SMITH: Well, Appendix M, I don't know about
24 that, but the survey.

25 What is she saying? Is she saying --

1 MR. LEWALD: Well, the survey and the
2 verification.

3 JUDGE SMITH: Is she saying the survey didn't do
4 it, the survey verification didn't do it?

5 MR. LEWALD: Yes. She's saying all of that.

6 JUDGE SMITH: Well, if you want in here any
7 information about the validity of the survey and the various
8 phases of it, if you want it in here, then you have to --
9 unless you refine your argument better, which is not very
10 well refined, then you are going to have to let the
11 intervenors follow your evidentiary trail.

12 MR. LEWALD: Well, the difficulty is that --

13 JUDGE SMITH: I'll tell you what the difficulty
14 is.

15 -- MR. LEWALD: -- we have two sets of --

16 JUDGE SMITH: You guys really stepped in it. You
17 know, that's what you did. You stepped in it when you put
18 this stuff in here and now you are trying to salvage it.

19 I'm sorry to interrupt. Go ahead, Mr. Lewald.

20 MR. DIGNAN: That's right.

21 In candor, Your Honor, what happened is that No. 6
22 was drafted when Dillman was still in the story.

23 JUDGE SMITH: Yes, exactly.

24 MR. DIGNAN: And I take responsibility for what
25 I'm about to say now.

1 The problem is, you know, you are trying to do
2 everything overnight. We didn't get it all. That's clear
3 to me. On the other hand, it's also clear to me that
4 everything they want out, at least what I've had outlined to
5 me they want out, shouldn't go out. And maybe what we do
6 have is a further refining problem, because some of what is
7 attacked here, it seems to me, directly does go to
8 Moriearty. Maybe we still haven't got it all.

9 But I'm not too concerned which way we go, because
10 as I understand, if I could review the bidding, where we are
11 is this.

12 Dillman and Moriearty are out and they are out on
13 the basis that the contention as answered to did not contain
14 an attack on the survey. Therefore, anything that follows
15 - Dillman and Moriearty out of this case doesn't really worry
16 me all that much, because the ruling of the Board is that
17 that is not in contention in the case and that's the end of
18 the matter, so nobody can do anything with it.

19 The problem we have, and maybe a break here to
20 further, as my sister said over there, use the scalpel as
21 necessary. The problem is Moriearty is still there and its
22 defining what directly goes to Moriearty and has nothing to
23 do with Dillman.

24 JUDGE SMITH: That's right. Or more yet, or
25 Moriearty's --

1 MR. DIGNAN: And candidly, it's fair for you to
2 say we stepped in it. I wouldn't say we stepped in it. We
3 walked into it knowingly. We just haven't got the foot out
4 of the muck yet since the ruling. It's that simple. And
5 it's a simple device of you've got so many hours in a day to
6 do this carving, and we apparently haven't carved it well
7 enough.

8 JUDGE SMITH: Well, don't forget, Moriearty was a
9 part of the Dillman Panel.

10 MR. DIGNAN: Yes, but I'm talking about -- all I'm
11 interested in responding to is Moriearty under 49.

12 JUDGE SMITH: Yes.

13 MR. DIGNAN: I mean that's my point. When I say
14 Moriearty, I mean Moriearty alone on 49 as opposed to
15 - Moriearty and Dillman. And maybe the best thing that's in
16 order is a recess. We'll take another cut in it and try to
17 satisfy the Attorney General.

18 JUDGE SMITH: Unfortunately, we're dealing with
19 some of it with an artificial situation here. And I
20 recognized from the outset there was no need for such
21 surgical precision, but apparently there is now.

22 MR. DIGNAN: Well, would it be helpful if I stated
23 we're prepared to stipulate that the testimony that is being
24 offered here is not going to be nor can it be under the
25 Board's rulings used for a finding, qua the methodology of

1 the survey. I mean the Board has thrown that issue out of
2 the case.

3 This is why I'm not sure what the argument is
4 really about here. Because if it be true that we have
5 methodology testimony in there, I agree it should come out.
6 But even if all of us acted as good legal surgeons and still
7 didn't get it all is no injury to anybody.

8 The injury, if any, to the Attorney General's case
9 occurred when the Board made the ruling as to the scope of
10 the contention, that finished the question of whether the
11 survey methodology was correct. They have an appeal on
12 that. And if somebody up the line says the Board
13 misinterpreted the contention, we're going to have to come
14 back and litigate survey methodology or deal with it
15 somehow.

16 So if it be a fact, it seems to me, that we
17 haven't done enough surgery yet, I'm certainly prepared to
18 sit down with my brother and sister and try to do more and
19 get it where everybody is really happy. It is still no
20 injury to them, because the fact that it's in is irrelevant.
21 Their appellate right on this whole matter is going to ride
22 on whether the Board's ruling as to the scope of the
23 contention was correct.

24 And if it turns out there is some stuff in there
25 that really turns out to be irrelevant because it's only

1 directed at that time issue instead of Ms. Moriearty, it
2 isn't a basis for error for anybody and it's no basis for us
3 to do anything with.

4 That's where I come out as to where it sits
5 legally. I am more than happy to sit down and try to do
6 even better surgery on the testimony if anyone deems that to
7 be necessary. But I think that's where we are. I just
8 don't think the result is going to affect the case that
9 much.

10 MS. TALBOT: Your Honor, I appreciate Mr. Dignan's
11 offer to sit down for a few minutes and do some more carving
12 and get everything blocked off which I think should still
13 go.

14 I would just like to get on for the record, Your
15 - Honor, that Mr. Dignan may think that it doesn't matter if
16 several pages of testimony dealing with the verification
17 process is contained in Applicants' Rebuttal No. 6. But the
18 Attorney General feels that because Dr. Dillman spent so
19 much time and effort criticizing this very process, we would
20 have to bring him in again to rebut any statements that go
21 to the verification process.

22 MR. DIGNAN: Well, if that's so, we will take them
23 out. But the problem is the -- I keep coming back to the
24 same thing. I understand good lawyers want to do that, and
25 the answer is to avoid Dr. Dillman having to fly east for no

1 purpose, let's get it out.

2 But still, the question of whether or not Dr.
3 Dillman's criticism should have been taken into account and
4 should have affected this case was settled with the Board's
5 ruling as to the scope of the contention. If the Board, I
6 submit respectfully, did err in that ruling, then you are
7 going to win upstairs. If the Board did not err in that
8 ruling, what we say about the validity of the survey or Dr.
9 Dillman comes back and says on some theory, is not going to
10 affect the case. It's just that simple.

11 JUDGE SMITH: Well, no, that's where you are
12 wrong. Because if you reintroduce the subissue --

13 MR. DIGNAN: My point is I'm not -- this is the
14 thing I said when I started off I'd be happy to stipulate.
15 Your Honor hit the nail right on the head. The testimony
16 was drafted with Dillman in the picture. You draft
17 testimony as an integrated whole.

18 You go back that night and say Dillman's out, and
19 we did. We took some out. We obviously didn't get it all.
20 I concede that. We should have got it all. And probably if
21 we took another cut last night, and maybe we still haven't
22 got it all. But we're not trying, believe me, to
23 reintroduce evidence of the validity of the survey
24 methodology. That's out of the case as I see it.

25 JUDGE SMITH: All right. That's correct.

1 So why don't we do this. Why don't we put off for
2 now what parts of the testimony have to be excised or
3 disregarded while you have a better opportunity to do it? I
4 mean, it is not easy, I recognize that, and we've spent a
5 lot of time on it already and I can see we could spend a lot
6 more time. Put it off. We have made the general rulings.

7 Just for the record the ruling is, so long as you
8 elect to reintroduce for another purpose the subissue of the
9 adequacy methodology, the methodology of the survey, the
10 survey process, that you have to permit a confrontation of
11 it.

12 MR. DIGNAN: Right.

13 JUDGE SMITH: And that is our ruling. But you are
14 at this time permitted to withdraw any element of that
15 - subissue being reintroduced.

16 MR. DIGNAN: And let's fully understand where we
17 are so everybody has a clean shot when we wrap this up.
18 What we need of the survey is not methodology, because I
19 deem that to be settled by the Board's prior ruling.

20 JUDGE SMITH: Not in issue.

21 MR. DIGNAN: Yes. What is left as an issue, as I
22 understand it, and the only purpose people are referring to
23 the survey is because the survey results, just the results,
24 not how we got there, but the results, of course, supply
25 certain of the numbers that lead to how many buses we went

1 out and got and how many ambulances.

2 And as long as that's fully understood, that's our
3 need for the survey. We need the results, because that is
4 the basis for which we defend the particular numbers we put
5 in the plan. And I don't find that to be at all at variance
6 with your prior ruling.

7 How we got the number is not an issue as I
8 understand the Board's prior ruling. And once that's
9 understood, and I am more than happy to do it surgically.
10 But whether we do it surgically or not, the appellate rights
11 of the Attorney General, it seems to me, are protected. Our
12 need for those numbers is protected. And Dr. Dillman can
13 happily not fly east unless he would really like to anyway
14 because it's spring.

15 MR. TRAFICONTE: Just so the record is the
16 clearest that it can be, I think perhaps we should go
17 through the extra time of making sure that we identify the
18 sections that are either going to be deleted, and I think
19 they probably should be deleted to conform them.

20 MR. DIGNAN: I concur with that.

21 MR. TRAFICONTE: And I don't think it will take us
22 that much longer.

23 JUDGE SMITH: Right now? Today?

24 MR. DIGNAN: No. What I was going to suggest is
25 if it's possible we could at least advance the ball. I

1 don't know whether the cross has been setup so that you can
2 leave this aside and do whatever you have to do. And during
3 the two-week break, I will delegate somebody from our group
4 to put that as number one priority on their list. And if
5 Mr. Traficonte would do the same, I am sure they can sit
6 down and we can agree on what the line outs of rewrites are.

7 JUDGE SMITH: Well, I know that once the Board has
8 made a clear ruling, and I think our ruling is pretty clear
9 now, that you have in the past shown the ability to in good
10 faith implement the ruling even though you don't agree with
11 it.

12 MR. TRAFICONTE: The only thing I think we need a
13 Board ruling on so that we can implement and not fight over
14 is the issue of verification.

15 Our view is that part of the methodological
16 critique we made, of course, was a critique on the
17 verification effort. They have come back and obviously, in
18 their last night's effort to use the scalpel, they cut some
19 methodology and left in the verification pages which are 11
20 and 12.

21 MR. DIGNAN: All right, let me tell you why I need
22 that and maybe that will set it up so that the ruling can be
23 clear for both of us.

24 MR. TRAFICONTE: Yes.

25 MR. DIGNAN: Our concern with getting in the fact

1 that we verified, that is to say we went back to people and
2 said, you know, after we got the original word, we went back
3 to people and said, is one thing. And that is, Ms.
4 Moriearty, in her JI-49 testimony as I read it, makes a big
5 point of the fact there has to be personal contact in order
6 to really know what you are doing. And all we need the
7 verification for is to demonstrate that we have made that
8 personal contact.

9 Again, it is not to try to prove methodology.
10 It's because your witness in JI-49 took the basic position
11 that you've got to have personal contact with these people
12 in order to really know their needs. And what we get from
13 the verification effort, and if any of my witnesses think
14 I'm saying something wrong, they will, I'm sure, advise me,
15 - "is to demonstrate that we have had the personal contact that
16 is necessary. And that comes straight out of, as I see it,
17 the JI-49 testimony.

18 So again, I think if you understand that and if
19 the Board agrees, you know, that issue is available and you
20 do too, again I think it's a surgery problem. Maybe we've
21 said it in words that give you pause, but that's all I'm
22 trying to get across is the fact that we did go back and
23 check on a one-to-one basis with these people as to what
24 their needs were, which is something, at least as I read Ms.
25 Moriearty, she said was necessary.

1 MR. TRAFICONTE: The only point --

2 JUDGE SMITH: Now where does Dillman or Moriearty
3 in Contention 48 critique the verification process?

4 MS. TALBOT: Bear with me a minute, Your Honor,
5 and I'll find it.

6 Your Honor, on page 21, there is a long summary
7 that goes on to page 22 where Dr. Dillman gets into the
8 critique of the verification process.

9 MR. TROUT: I think you mean 22 and 23.

10 MS. TALBOT: And 23. Twenty-one, 22 and 23 and
11 24.

12 MR. TROUT: I don't see it on 21.

13 JUDGE COLE: I don't see it on 21 either?

14 MS. TALBOT: Twenty-one.

15 JUDGE SMITH: What is it? Tell me again what
16 we're looking for.

17 MS. TALBOT: The critique of the verification
18 process.

19 JUDGE SMITH: Well, I see it on 21.

20 MS. TALBOT: Right. It's there.

21 He also sets the foundation for his testimony on
22 page 5.

23 JUDGE SMITH: Wait a minute.

24 JUDGE COLE: I've got a different page 21 than
25 these guys.

1 MS. TALBOT: Oh, I'm sorry. You must have the
2 rejected corrected copy as opposed to the --

3 JUDGE COLE: It's the copy you gave me yesterday.

4 MR. TRAFICONTE: Yes, that was not the --

5 JUDGE SMITH: Should have raised your right hand
6 on that one.

7 MS. TALBOT: Pardon me, Your Honor?

8 JUDGE SMITH: No, it's the one dated April 24th
9 that we have.

10 MS. TALBOT: I'm using the old one. I'm sorry.

11 JUDGE SMITH: You don't have the corrected copy
12 with you?

13 MS. TALBOT: No. I have the old one.

14 JUDGE SMITH: You have the old one.

15 MS. TALBOT: So if I refer you to pages, it will
16 be skewed.

17 JUDGE SMITH: It's in the transcript. Let's get
18 it out of the transcript.

19 What day was that?

20 No, it's in the rejected exhibits. I've got a
21 copy of that. Here, I will give you back the one you gave
22 me yesterday.

23 MS. TALBOT: Will you have one then?

24 JUDGE SMITH: If I can find it.

25 (Pause to locate document.)

1 MR. DIGNAN: Your Honor, actually to place the
2 question in focus, because I'm really, again as long as
3 we're talking about a need for surgery, I'm not too
4 concerned with what is in the JI-48 testimony, because I'm
5 confident of an ability to meet a need to avoid that
6 problem.

7 The problem I have, so everybody understands it,
8 is if you look at the JI-49 testimony, you find in it
9 statements like "I believe that effective emergency planning
10 for this population," this is at page 23, "requires
11 comprehensive individualized needs assessment drawn up well
12 in advance."

13 And at page 11 there is a statement, "In my
14 opinion, this question cannot really be answered without an
15 - individualized needs assessment."

16 All I'm trying to do, we are trying to do on this
17 side, with keeping the fact that we verified, is to
18 demonstrate there has been an individualized assessment by
19 virtue of the fact of verification remains.

20 Again, this does not go to methodology. It goes
21 to meeting what is in JI-49. And again, if the Board's
22 ruling is clear that I have to meet JI-49 and I've got no
23 business meeting JI-48, I come down to over a two-week
24 period we can get the necessary language to put everybody at
25 ease.

1 JUDGE SMITH: The Board's ruling is really simpler
2 than that. If you put anything in there to support your
3 case, they have a right to confront it.

4 MR. DIGNAN: Exactly. Exactly.

5 JUDGE SMITH: And if the confrontation means
6 reposes in the Dillman-Moriearty testimony, then you have
7 got a choice of either letting that in or taking yours out.

8 MR. DIGNAN: And I understand that.

9 JUDGE SMITH: As a general rule.

10 MR. DIGNAN: I understand that. And I think with
11 that ruling, we can do it. Because all we're trying to meet
12 is Moriearty. I mean I would be crazy to try to meet
13 anything over in 48. It's not in the case.

14 MR. TRAFICONTE: Well, 48 is in the case. JI-48
15 - has not been withdrawn or --

16 MR. DIGNAN: No, I know it's not withdrawn.

17 MR. TRAFICONTE: Okay.

18 MR. DIGNAN: But I mean the scope of that
19 contention has been set.

20 MR. TRAFICONTE: Yes. Yes.

21 MR. DIGNAN: And that's my only point. I do think
22 it's a surgical problem. And at least if it is the Board's
23 pleasure, I would be prepared if we could use the time for
24 that, if my sister is prepared to go forward with other
25 parts of this testimony, we could use that time today and

1 we'll have somebody sit down with whoever Mr. Traficonte
2 picks from his office. And my guess is we can come up with
3 something that will either keep everybody happy or present
4 the Board with a squarely defined issue to finally make a
5 ruling on after the recess.

6 JUDGE SMITH: Well, this is a very inefficient way
7 to spend time. You know, scrambling around for the
8 documents and everything.

9 MR. DIGNAN: I agree.

10 JUDGE SMITH: And getting reoriented to them, and
11 it can be put to a better use.

12 MR. TRAFICONTE: I think if the Board has ruled
13 that if a piece of their testimony, for example, on
14 verification is retained, that you've ruled that we will
15 have the right to confront it, that should guide us. And I
16 know it will guide me and I'm sure it will guide Mr. Dignan
17 the same.

18 MR. DIGNAN: Well, I don't understand that to be
19 the ruling but that's okay. We will get by.

20 MR. TRAFICONTE: Well, I thought that's pretty
21 much what the Judge --

22 JUDGE SMITH: Well, I'm talking in general terms.
23 I see that there is something in there in 48 about the
24 verification forms and process. Without analysis, I'm not
25 going to rule as to whether, or whatever it is, except that

1 it is there. Maybe there may be reasons why it does not
2 pertain to the Panel's testimony on page 17. I don't know.
3 I mean you analyze that. I don't know.

4 I'm just announcing the general rule which is true
5 in every fair proceeding. And that is, for whatever reason
6 they introduce an issue, you don't have due process until
7 you confront it, whatever reason, until you have that
8 opportunity to confront it.

9 And their choice is to withdraw it or let you
10 confront it. And if the proper place to confront it is in
11 the Dillman testimony, so be it.

12 MS. TALBOT: Your Honor, just for the record I
13 just want to state now the pages that Applicants have chosen
14 not to strike bear exactly on the verification issue. And
15 just so Your Honors know the page cites to the JI-48
16 testimony, it's pages 5, 16, 17, 20, 21 and 22.

17 JUDGE SMITH: That's the Dillman --

18 MS. TALBOT: Correct.

19 JUDGE SMITH: All right. Would you give them to
20 me again?

21 MS. TALBOT: Five, 16, 17, 21, 21 and 22 in the
22 corrected testimony filed on April 24th.

23 Your Honor, I'm prepared to go forward with cross-
24 examination on matters that don't pertain to the survey
25 until this issue has been ironed out.

1 JUDGE SMITH: All right.

2 MS. TALBOT: Before I continue, I think Mr. Fierce
3 has one matter he would just like to raise at this point.

4 JUDGE SMITH: Mr. Fierce.

5 MR. FIERCE: I'm sorry, Your Honor, for doing this
6 now. I was unable to get in here at 8:30 when I should have
7 raised this as a matter of preliminary business, and I
8 actually wanted to talk to Ms. Chan before I raised this
9 issue to see what developments --

10 MS. CHAN: Could we discuss this off the record
11 for a second?

12 MR. FIERCE: Yes. May we have a minute to talk?

13 JUDGE SMITH: All right.

14 (Discussion off the record.)

15 -- JUDGE SMITH: Mr. Traficonte.

16 MR. TRAFICONTE: I'm going to get my watch out,
17 Your Honor, first. This is going to be a first in this
18 proceeding. I'm going to do this in less than 10 minutes.

19 I just want to take the opportunity to reply to
20 some argument presented by FEMA in response to Mass AG's
21 April 5 motion to compel production of certain documents.
22 My reply is very limited. As is clear from the motion, I
23 think we are seeking to compel on 15 or 16, approximately 16
24 documents. I understand that but for two the claim is in
25 every instance deliberative process privilege. I'm not

1 going to address any comments to it.

2 There are, however, two documents, and they are
3 numbered. Number 23, and the numbers are taken from a
4 letter or a list provided to me by Mr. Flynn. Number 23 and
5 No. --

6 MS. MCPHETERS: Seventy-two, I believe.

7 MR. TRAFICONTE: -- 72. Yes, I think that's
8 correct. Thank you.

9 I want to report, first of all, that we will
10 present no argument, and in fact withdraw the motion as to
11 the production of No. 23 for the following reason.

12 That document was provided by a representative of
13 FEMA at an earlier point to the public. We are in
14 possession of the document.

15 -- JUDGE SMITH: Which document is that?

16 MR. TRAFICONTE: Number 23.

17 JUDGE SMITH: Well, what are we wasting time on it
18 for?

19 MR. TRAFICONTE: Well, that's why I'm not going to
20 present argument on No. 23.

21 JUDGE SMITH: Oh, I see.

22 MR. TRAFICONTE: That's a recent discovery on our
23 part. And just so the record is completely clear how that
24 occurred, the document was made public to a lawyer, working
25 on the Seabrook case not in our office. It was not made

1 public to the Mass AG. But it found its way to our office
2 through this other individuals, and I now have a copy of it.
3 So there is no point in me moving to compel on it, and FEMA
4 should be aware of that as a fact. The document was
5 disclosed not to our office, and that's why we continued to
6 compel on it, but at some prior time to this other
7 individual.

8 MS. MCPHETERS: I confess that Mr. Flynn and I
9 were not aware of that.

10 MR. TRAFICONTE: I don't doubt that.

11 MS. MCPHETERS: I had no idea. Had we known it
12 was disclosed, we would have not have pressed it.

13 JUDGE SMITH: It is a matter of no concern to us.

14 MR. TRAFICONTE: Right.

15 MS. MCPHETERS: All right.

16 MR. TRAFICONTE: As a clue to FEMA, I would ask
17 them to consult the "cc" list on the document.

18 MS. MCPHETERS: All right.

19 MR. TRAFICONTE: Now as to No. 72, however, and
20 this is why I know I can make it in less than 10 minutes, I
21 do want to present some argument. I've read the FEMA
22 response and I think we can get to the nub of this pretty
23 quickly.

24 Not having seen the document, I will take it as a
25 given that it is an attorney/client communication. I can't

1 judge that, but we'll take that as a given.

2 I think the attorney/client privilege is waivable
3 and the circumstances for its waiver, I think are fairly
4 limited, but it's waivable if the individual is asked
5 questions concerning a certain subject matter as fairly well
6 delimited and the individual knows what he is talking about
7 and what the questions run to. If he's asked certain
8 questions as to his communications with counsel in that
9 subject matter or about that subject matter, and he answers
10 those questions. He says, yes, I will tell you what I told
11 counsel. Yes, I will tell you what advice I sought from
12 counsel as to that subject matter.

13 I believe that's a waiver, and it would extend to
14 a document concerning the same subject matter in the same
15 time period. That's essentially the nub of the issue.

16 I have read FEMA's response. They seem to be
17 saying two things, neither of which is persuasive to my
18 mind.

19 The first is, they seem to be making something of
20 the fact that the document we are now seeking is a December
21 '88 document. But the conversations Mr. Donovan described
22 in his deposition were prior in time. I don't think
23 anything hinges on that.

24 Mr. Donovan's own affidavit, which as been filed,
25 which I now no longer have a copy of, but which I now can

1 recall, at least for the next minute or so, makes a
2 reference to what the content of his December communication
3 to Mr. Flynn is. And I believe it's in paragraph No. 2 of
4 Mr. Donovan's affidavit. He says that he communicated to
5 Mr. -- in paragraph two of his affidavit, he communicated to
6 Mr. Flynn concerning his customary practices in regard to
7 the retention of exercise materials. That's his description
8 of what the communication to his attorney was in December.

9 At his deposition we went over in some detail his
10 customary practices in this regard. I asked him what they
11 were. I asked him who at FEMA knew what they were. And I
12 think he has waived, and I asked him whether he communicated
13 that to his attorney. Did he have discussions with an
14 attorney regarding those customary practices.

15 - - To that extent, I think he's waived his privilege
16 on those matters. The fact that he described the
17 conversations with counsel that preceded the memo is not
18 relevant.

19 So the first point is, I think counsel for FEMA is
20 trying to make something of the difference between a
21 September discussion and a December memo. I think that's
22 irrelevant.

23 The second point is really contained in that. And
24 the second point is the waiver is only as to subject matter.
25 And a case is cited for the proposition by FEMA that it

1 should be limited to the subject matter.

2 I agree. The cases we cite stand for the same
3 proposition, limit it to subject matter. But again,
4 referring to Mr. Donovan's own affidavit in paragraph two,
5 he is describing the content of the communication to Mr.
6 Flynn as dealing with precisely the same subject matter that
7 was discussed at his deposition, i.e., his practices with
8 regard to the destruction of documents.

9 So on that point I don't think, and I know our
10 request here is described as a global, or that the waiver
11 should be seen as global. I don't believe our request or
12 our view of the waiver is that it's a global waiver. I
13 think our argument is that Mr. Donovan waived his privilege
14 with regard to attorney/client communications in the time
15 --frame involving the destruction of these exercise documents
16 to that extent; i.e., his destruction of the documents, his
17 practice normally as to destroying documents of like nature,
18 and the document -- again, I haven't read it, but I take it
19 that the document he wrote to Mr. Flynn is right at the
20 heart of those issues.

21 And I believe in those limited circumstances there
22 is nothing wrong with a waiver, or having the Board rule
23 that there has been a waiver of his attorney/client
24 privilege.

25 I note, by the way --

1 MR. DIGNAN: Seven minutes, I believe.

2 JUDGE SMITH: Wait until he answers the questions?

3 MR. DIGNAN: I know.

4 (Laughter)

5 JUDGE SMITH: Do you have anything to respond?

6 MS. MCPHETERS: Yes, I do, Your Honor.

7 We, of course, don't --

8 JUDGE SMITH: Did you assert privilege for the
9 entire document?

10 MS. MCPHETERS: Yes, we do, Your Honor. I don't
11 have the document in front of me, but, yes, we do.

12 JUDGE COLE: Did you want to borrow a copy?

13 MS. MCPHETERS: It would be convenient if I could.

14 (Document proffered to counsel.)

15 -- MS. MCPHETERS: Should I wait, Your Honor?

16 JUDGE SMITH: Well, we had a conversation about --
17 who is the client who has the privilege? FEMA is the
18 agency.

19 MS. MCPHETERS: Yes, and specifically in this
20 case, Mr. Donovan communicating to Mr. Flynn as his attorney
21 in this matter in which the Attorney General raised by
22 motion the subject of the propriety of Mr. Donovan's actions
23 in discarding these exercise documents in draft, and Mr.
24 Donovan's communications with Mr. Flynn precisely for that
25 purpose.

1 JUDGE SMITH: The Board has looked at two parts of
2 the document. On page 1 of Document 72, the middle of the
3 page, there are three comments, one, two, and three, going
4 to an unnumbered page 2. Half way down the page there is a
5 paragraph that begins, "FEMA has prescribed", ending at the
6 end of the first paragraph on page 3.

7 Can you tell us, do you know if this information
8 has been revealed otherwise?

9 I might warn you in advance if it has been
10 revealed, then you may have a problem of waiver. If it
11 hasn't been revealed, then you may have a problem of, is it
12 needed for the litigation.

13 Have you focused on the information?

14 MS. MCPHETERS: Yes. Excuse me, Ms. Chan was
15 --trying to speak to me and I couldn't hear both you and her.

16 JUDGE SMITH: Okay. Focus on the first three --
17 the three numbered items on page 1, and on page 2, the
18 beginning of the page, all the way down to the end of that
19 page and over to the end of the first paragraph on page 3,
20 stopping with the word "material".

21 MS. MCPHETERS: Your Honor, I am not in a position
22 to state unequivocally what Mr. Donovan may have said about
23 this general subject area at any time in the past, present
24 or future. I just wouldn't be able to make the
25 representations on that.

1 I think I can say very specifically, however, that
2 in terms of the context of his litigation and his action in
3 the Seabrook matter being challenged, that these
4 communications and this discussion was solely between him
5 and Mr. Flynn.

6 JUDGE SMITH: Well, I understand that. So we
7 won't belabor whether he has made this information otherwise
8 available. I suspect that he has. So we won't worry about
9 waiver.

10 It's our view, we've already discussed it, that
11 given the circumstance of this case the fact that we have a
12 final report and that the underlying documents are no longer
13 available, that we believe that the attorney/client
14 privilege is outweighed by the needs to use this information
15 in cross-examination of Mr. Donovan.

16 MS. MCPHETERS: May I be heard on that, Your
17 Honor, before your ruling becomes final on that?

18 JUDGE SMITH: Yes.

19 MS. MCPHETERS: First of all, in terms of --

20 JUDGE SMITH: Now only that information. The rest
21 of the document continues to be privileged.

22 MS. MCPHETERS: I appreciate that distinction.

23 Of course, we will abide by the Board's ruling,
24 but I must press the privilege as to the entire document.

25 First of all, in terms of need, at Mr. Donovan's

1 deposition at January 10th, Mr. Traficonte had an
2 opportunity and did go into detail with Mr. --

3 JUDGE SMITH: Well, there you go. See, I was
4 asking you about it, and now you're coming back with the
5 information.

6 MS. MCPHETERS: I guess I wasn't focusing
7 specifically on that. There was some discussion with Mr.
8 Donovan as to --

9 JUDGE SMITH: Here's what we have here. We have
10 information which is directly relevant to Mr. Donovan's
11 credibility when he takes the stand. I'm not commenting on
12 whether it reflects adversely or one way or the other, but
13 it is going to be directly relevant to his credibility when
14 he takes the stand on the exercise.

15 -- If the information as contained in here, and I
16 suspect it has, has been freely made available by Mr.
17 Donovan otherwise, and you can point that out, then we don't
18 have any trouble. We will just say there is no need to
19 reveal it.

20 If you can't, then we believe that this
21 information should be made available to Mr. Traficonte for
22 cross-examination of Mr. Donovan.

23 MS. MCPHETERS: I understand the distinction, and
24 with that, Your Honor --

25 JUDGE SMITH: Not only that, but let's harken back

1 to our discussion the other day.

2 Well, go ahead.

3 MS. MCPHETERS: All right.

4 JUDGE SMITH: There is another concern the Board
5 has. Even though you have agreed that this is
6 attorney/client, it has that peculiar aspect of
7 attorney/client which is more like two policymakers talking
8 back and forth, talking about what the situation is in the
9 agency with one strong exception, that Mr. Flynn is seeking
10 the information for use in this litigation. Other than
11 that, it would be sort of Mr. Flynn is a policymaker and Mr.
12 Donovan is a policymaker, and they are having a policy
13 debate or discussion, and that we would probably say is a
14 dual privilege -- deliberative process and attorney/client.

15 But with respect to the factual assertions set out
16 in the part that I have identified, I would not give that a
17 deliberative process privilege. That would not make it
18 deliberative process. And it comes under the
19 attorney/client because it is a part of the factual
20 information given to the attorney that he must have in
21 representing your agency to the proceeding.

22 MS. MCPHETERS: Quite right, Your Honor. And in
23 addition to that, it's in a circumstance where the propriety
24 of Mr. Donovan's own conduct has been called into attention
25 by the Attorney General, and he is communicating with his

1 attorney in terms of his representation on that. And for
2 this matter Mr. Donovan's personal attorney is Mr. Flynn.

3 JUDGE SMITH: But this is not a criminal matter we
4 have here. You know, this is an administrative proceeding.

5 MS. MCPHETERS: It's a civil matter. It's a civil
6 administrative proceeding. But nonetheless, it is a matter
7 of litigation in which Mr. Donovan has counsel.

8 JUDGE SMITH: What is your advice? You read these
9 paragraphs, four paragraphs beginning on page 2. If you had
10 to examine Mr. Donovan on what happened to those papers, do
11 you think you ought to have that information?

12 MS. MCPHETERS: Your Honor, no, I do not. I think
13 if I were sitting in Mr. Traficonte's chair, I would not be
14 entitled to it for several reasons.

15 First of all --

16 JUDGE SMITH: You would be entitled to it.

17 MS. MCPHETERS: I would not be.

18 JUDGE SMITH: Would not.

19 MS. MCPHETERS: I would not be.

20 First of all, Mr. Traficonte had an opportunity to
21 go over these matters with Mr. Donovan at his deposition.
22 He will have a further opportunity here when Mr. Donovan
23 appears.

24 Beyond that, Your Honor, and we haven't briefed
25 this specific point because I didn't know it would come.

1 But I am somewhat familiar with the attorney/client
2 privilege. I have had occasion to write appeals on it on
3 both sides on at least two occasions.

4 In contrast with the attorney work product
5 privilege, the deliberative process privilege which can be
6 overcome by a showing of need, the attorney/client privilege
7 that common law privilege has a rather special and sacred
8 status of the law. And a showing of need is not a factor in
9 whether the privilege should be -- there may be an
10 attorney/client privilege where that's the only information
11 in the world about a particular matter that the other side
12 needs. And if it meets the standards of the privilege, it
13 is an absolute bar.

14 JUDGE SMITH: Do you agree, Mr. Traficonte?

15 - " MR. TRAFICONTE: I do not agree with that. And I
16 would want to make a couple of --

17 JUDGE SMITH: Your clock is running.

18 MR. TRAFICONTE: Pardon me?

19 JUDGE SMITH: Your clock's running.

20 MR. TRAFICONTE: All right, that's fine, that's
21 fine. I would just want to make a couple point.

22 First of all, to the extent that the information
23 the Board is referring to has been disclosed publicly, and I
24 was just reading over the excerpts from his deposition that
25 I attached to our motion, to the extent that Mr. Donovan has

1 disclosed the information, then as an attorney/client
2 privilege claim, it falls dead in the water because the
3 information is no longer --

4 JUDGE SMITH: Well, no, I don't know if that
5 necessarily follows. I suggested that might be the case.

6 MS. MCPHETERS: That was the case I cited which
7 speaks to the time of the -- the Goldman case where the
8 court did not order disclosure of attorney/client subject
9 that conversations on the same subject matter that occurred
10 at a later time --

11 MR. TRAFICONTE: The time was irrelevant.

12 MS. MCPHETERS: -- and that is precisely what we
13 have here.

14 MR. TRAFICONTE: The time is completely
15 irrelevant.

16 JUDGE SMITH: Let's say that a client gives to his
17 attorney information which is just as public as it could be.

18 MR. TRAFICONTE: Right.

19 JUDGE SMITH: And he runs around and he repeats
20 this information all over the place, cocktail parties, all
21 over the place. The fact that he gave it to his attorney is
22 entitled to the privilege.

23 MR. TRAFICONTE: The fact that he communicated --
24 let's start back one step.

25 The privilege protects the confidential

1 information conveyed by the client to the attorney. It's
2 the confidentiality of the information provided that is
3 really the touchstone of the privilege. In a sense, the
4 origin of the privilege. And it has a criminal context
5 originally.

6 It's that communication to the attorney of
7 something nobody else knows that starts the privilege on its
8 course.

9 If I understand what Ms. McPheters has said and
10 the Board's review of the document, there may well be
11 information stated in this document that is either a matter
12 of public record or Mr. Donovan has affirmatively made it a
13 matter of public record.

14 If either is the case, those portions of the
15 document simply are not -- they don't contain or reflect
16 confidential communications by client to attorney. And on
17 that point the privilege doesn't even -- in a sense, it
18 doesn't even get born.

19 I had been assuming, perhaps incorrectly, that the
20 document contains information not disclosed to me at the
21 deposition or otherwise.

22 JUDGE SMITH: Oh, no.

23 MR. TRAFICONTE: Well --

24 MS. MCPHETERS: Your Honor, if --

25 MR. TRAFICONTE: -- I can't know because I can't

1 see the document. My point would be, unless it does that,
2 then the privilege doesn't even get born. And if it does
3 that --

4 JUDGE SMITH: You're entitled to it for need.

5 MR. TRAFICONTE: There would really be no
6 cognizable claim of privilege on it.

7 JUDGE SMITH: But I mean if the information was
8 not extracted from you at the deposition.

9 MR. TRAFICONTE: Oh, then I would want it because,
10 you know, I asked him specific questions --

11 JUDGE SMITH: Yes.

12 MR. TRAFICONTE: -- about his communications with
13 his counsel, and he answered them, and he didn't mention
14 this document.

15 You know, there is a credibility dimension. Why
16 didn't he tell me that he wrote a memo on this same point.

17 JUDGE SMITH: Okay.

18 MS. MCPHETERS: Your Honor, if I might respond to
19 that. It's not a matter of the confidentiality of the
20 information or whether it's otherwise known. What's
21 confidential is the communication with the attorney. And
22 again, the attorney/client privilege is one of the oldest of
23 the common law privileges, and there is substantial case
24 authority on it, and I would like the opportunity to brief
25 it.

1 MR. TRAFICONTE: You did.

2 MS. MCPHETERS: But if the defendant -- not on
3 this point. But if the man charged with the murder tells
4 his attorney, I committed this murder, and the prosecutor is
5 not going to be able to prove the case any other way, that
6 doesn't make it. It's not a matter of need for the
7 information or that he otherwise would really like to have
8 it. But if the --

9 MR. TRAFICONTE: Your Honor, I --

10 JUDGE SMITH: The criminal analogy is not apposite
11 here.

12 MR. TRAFICONTE: Or the civil analogy if there is
13 no way other to show that the defendant was responsible for
14 the automobile accident or anything else. We are talking
15 - here about adverse parties in litigation in this context
16 where the conduct of Mr. Donovan as a FEMA official is
17 called into question by the Massachusetts Attorney General.
18 And we are talking about a communication with his attorney.

19 Now at Mr. Donovan's deposition he testified about
20 conversations that he had with Mr. Flynn prior to discarding
21 the documents, and which certainly is relevant to any point
22 I would think that Mr. Traficonte would like to make. He
23 has that. He has that in deposition testimony. He will
24 have that in testimony before the Board if he wants to
25 elicit it. But Mr. Donovan, by so doing, certainly did not

1 we've his right to confidential consultations in providing
2 the information to his attorney on this matter as a
3 prospective future matter. And that is precisely what the
4 Goldman case is that we cited in our memorandum at page 13
5 where the District Court in that case made that precise
6 delineation, and allowed the waiver as to the conversations
7 that occurred before the attorney's testimony on that
8 matter, but not as to --

9 JUDGE SMITH: All right.

10 MS. MCPHETERS: And that takes into account both
11 parties.

12 JUDGE SMITH: We will take into account your
13 arguments and take the matter under advisement. And I hope
14 to be able to give you a ruling on Tuesday.

15 MS. MCPHETERS: Very well. Your Honor, I will try
16 to supply citations to you on Monday on the matter of --

17 JUDGE SMITH: Wait a minute. Then Mr. Traficonte
18 is going to want to -- if you are going to brief it again,
19 and Mr. Traficonte needs whatever information he's going to
20 get, FEMA has given us such a difficult time in not
21 appreciating the pace.

22 You know, when you do one thing, you set into
23 motion something else. If you file a brief, he's got 10
24 days plus -- he's got 15 days to respond to it.

25 MS. MCPHETERS: Your Honor, this was a reply as I

1 understand. This was not a brief in the first instance. It
2 was a reply to his motion.

3 JUDGE SMITH: You are seeking leave to file a
4 reply.

5 MS. MCPHETERS: Your Honor, I would seek leave to
6 submit case authority, and I will fax it to Mr. Traficante
7 on Monday at the same time that I provide it to Your Honor,
8 specifically on the matter of whether the attorney/client
9 privilege can be overcome by a showing of need.

10 JUDGE SMITH: All right.

11 MR. TRAFICANTE: Before we agree to that, you did
12 not hear me argue that the attorney/client privilege can be
13 overcome by need. The Board mentioned that and said that to
14 me and I don't think I responded.

15 We can save ourselves the effort of that briefing
16 by having me state that it's my understanding of the
17 attorney/client privilege that it is not and cannot be
18 overcome by need.

19 JUDGE SMITH: Well, you have something else
20 involved here as I stated. You don't have a clear cut
21 distinction between what is communications between two
22 policymaking --

23 MR. TRAFICANTE: It sounds to me like this is the
24 deliberative process privilege claim coming in as an
25 attorney/client claim. That's what it sounds like to me.

1 JUDGE SMITH: And you've got the problem briefed
2 very well by Mr. Trout some time ago, and that is, you've
3 got to look at attorney/client, as argued against you.

4 MR. TRAFICONTE: Yes.

5 JUDGE SMITH: And you always have to bear in mind
6 who is a policymaker and who is a client.

7 MR. TRAFICONTE: Yes, I was quite --

8 JUDGE SMITH: And that's where I start getting
9 into need.

10 MR. TRAFICONTE: Well, that would be appropriate.
11 Again, I haven't seen the document.

12 Your Honor, I heard you say that Mr. Flynn sought
13 information from Mr. Donovan. Now --

14 MS. MCPHETERS: That's what attorneys do, and the
15 --attorneys communicate back to their counsel. That is the
16 classic posture of the attorney/client privilege.

17 MR. TRAFICONTE: When they are representing those
18 clients, it would seem --

19 MS. MCPHETERS: He is representing Mr. Donovan in
20 regard to your allegation of wrongdoing of Mr. Donovan.
21 This is not the policymaker context in this matter. This
22 does not concern future policy of the agency. This occur in
23 litigation over an act of one of FEMI.'s officials that
24 occurred in the past that is precisely put at issue by you
25 in this Seabrook litigation.

1 MR. TRAFICONTE: I'm going to go over the 10-
2 minute limit, I guess.

3 Here's how I see it. I asked Mr. Donovan at his
4 deposition what is -- and I'm summarizing, but it's there.
5 In fact we attached, I think, all the relevant sections to
6 our motion. I asked him what was your normal practice with
7 regard to retaining documents. What do you normally do out
8 in Seattle or Washington?

9 I asked him a series of questions about what did
10 you do in this instance. Who knew what your practice was at
11 FEMA? Who knew you were going to destroy the documents or
12 discard them? Did you have discussions with counsel about
13 discarding them?

14 And the answer was, yes. And I look at Mr. Flynn,
15 --it's right here in the record. I said, "Now, Mr. Flynn,"
16 and at that point Mr. Flynn pipes up, "If you don't mind,"
17 and I said, "You're not claiming attorney/client?"

18 Mr. Flynn, "No." Mr. Donovan is sitting in the
19 room not saying a word about, well, yes, yes, we do want a
20 claim. There was a whole series of questions about
21 customary practice about discarding documents. There was a
22 question about did you talk to your attorney about that.
23 There was an answer. There was a series of questions in
24 that regard.

25 If I understand what this document concerns, and I

1 get it from comments from the Board as well as the affidavit
2 of Mr. Donovan, it concerns Mr. Donovan's customary
3 practices with regard to the discarding of documents
4 connected to exercises.

5 I can't for the life of me see, first of all, he
6 doesn't mention in his deposition that he did have a further
7 consultation. The deposition post-dates that document. I
8 mean there is no question here that he wrote the document
9 after the deposition. The deposition occurs as the last
10 event. This goes unmentioned in his deposition, and it
11 apparently concerns the subject matter that we had full
12 disclosure on.

13 Now if I understand the argument of FEMA counsel,
14 it's because we had full disclosure I don't need the
15 -document. That seems completely circular. It's because we
16 had full disclosure, it's not confidential. Either it isn't
17 confidential, and even if it is, he's waived it. And I need
18 the document because it may say something contrary to what
19 he said in his deposition.

20 JUDGE SMITH: Well, we are going to need further
21 briefing then, I guess. You claim that attorney/client,
22 even among government policymakers, client/lawyer, is
23 absolute. No matter what it may reveal it cannot -- what it
24 may say, it cannot be revealed, no way, even if it should
25 demonstrate absolute contrary evidence to the testimony,

1 which I'm not saying it does -- it doesn't, as a matter of
2 fact -- it cannot be revealed.

3 MS. MCPHETERS: Yes, Your Honor, that is right.
4 If the five or so classic requirements of the
5 attorney/client --

6 JUDGE SMITH: In an administrative proceeding.

7 MS. MCPHETERS: Yes, in any proceeding.

8 JUDGE SMITH: Okay. You're going to cite that.

9 MS. MCPHETERS: That is, I think, the rule and the
10 overwhelming societal interest underlying the
11 attorney/client privilege. And I do not know of any
12 exception in the government context or the corporate
13 context.

14 JUDGE SMITH: Okay, you brief that. But mix into
15 --there the problem that you have that I am alluding to, the
16 two hats that these people wear. You know, the policymakers
17 and getting ready for trial. Just mix that in.

18 MS. MCPHETERS: I will, Your Honor. I will. I
19 can tell you it will go as to whether we're looking at
20 actions that occurred in the past being addressed in
21 litigation or whether we're looking to future policy. And I
22 will be glad to do that.

23 MR. TRAFICONTE: Knowing I will have another
24 crack --

25 MS. MCPHETERS: When would Your Honor wish to

1 receive it?

2 I can try to do it very fast and fax it to you by
3 the end of the day on Monday.

4 JUDGE SMITH: No, have it early Tuesday morning.

5 MS. MCPHETERS: Very well.

6 MS. DOUGHTY: Your Honor, I spoke with FEMA
7 counsel over the break about the motion to reconsideration
8 we would like to make the Murli and Siminon documents. And
9 she does not have those here today she's advised me.

10 JUDGE SMITH: I have no idea what you are talking
11 about.

12 MS. DOUGHTY: These were the documents, the motion
13 to compel, that the Board has already ruled on in regard to
14 the deliberative process privilege.

15 - We are going to move for reconsideration.

16 JUDGE SMITH: To us?

17 MS. DOUGHTY: Yes. Because Mr. Backus had some
18 additional facts that I didn't include in my argument. I
19 was not at the Creamer deposition and I didn't realize Mr.
20 Creamer had produced some of his notes related to the
21 exercise at that deposition.

22 JUDGE SMITH: Well, I'll tell you that's going to
23 be a very low priority on our calendar. We have read those
24 documents, and as we looked at them, we recognize the
25 deliberative process. And we looked at the needs test all

1 the way through.

2 Go ahead, make your motion.

3 MS. DOUGHTY: Well, our motion would be that the
4 Board reconsider because Mr. Creamer has already produced
5 some documents on his notes on the exercise, and we have a
6 need. In order to be able to test the credibility of the
7 process by which --

8 JUDGE SMITH: Well, he's going to do it in
9 writing.

10 MS. DOUGHTY: Pardon?

11 JUDGE SMITH: He's going to have to do it in
12 writing.

13 MS. DOUGHTY: All right, that's fine.

14 JUDGE SMITH: And then if you want an accelerated
15 response to it, you will have to ask for it. And he's going
16 to have to establish why he couldn't have made his argument
17 all at once, and he's got a heavy burden here, but just let
18 him do it in writing and we will take it up in due course.

19 MS. DOUGHTY: All right.

20 JUDGE SMITH: Let's go.

21

22

23

24

25

1 Whereupon,

2 MICHAEL C. SINCLAIR

3 ANTHONY M. CALLENDRELLO

4 DENNIS S. MILETI

5 having been previously duly sworn, were recalled as
6 witnesses herein and were examined and testified further as
7 follows:

8 JUDGE SMITH: Judge Cole pointed out that I
9 referred to the top of the second page when I was really
10 referring -- of the Donovan memorandum -- I was really
11 referring to the portion beginning at the middle of the
12 second page and ending at the top of the third page.

13 JUDGE COLE: Four paragraphs.

14 MS. MCPHETERS: I'm sorry, Your Honor. Could you
15 say that once more because I want to be sure I've got it.

16 JUDGE SMITH: Judge Cole reported to me that I
17 misspoke and I referred to a paragraph on the top of the
18 second page. If I did, I meant to speak of the paragraph on
19 the top of the third page.

20 The subject matter that I was talking about begins
21 in the middle of the second page --

22 MS. MCPHETERS: Right.

23 JUDGE SMITH: -- with the words "FEMA has
24 prescribed".

25 MS. MCPHETERS: Yes.

1 JUDGE SMITH: And ends at the end of the first
2 paragraph on page 3.

3 MS. MCPHETERS: I have that.

4 JUDGE SMITH: With the final word being
5 "material".

6 MS. MCPHETERS: Right.

7 Your Honor, I will return the documents that the
8 Board kindly made available to me to argue.

9 JUDGE SMITH: All right.

10 MS. TALBOT: Your Honor, before I start cross-
11 examination of the panel, does Your Honor wish to address
12 the items discussed yesterday pertaining to the exhibits,
13 particularly Attachment S that we moved to have stricken?

14 JUDGE SMITH: Oh, I would assume they are going to
15 look at that too.

16 Oh, S?

17 MS. TALBOT: Right.

18 JUDGE SMITH: No. Well, that's right, you were
19 going to be given an opportunity to save S, which was the
20 American Red Cross --

21 MR. LEWALD: The American Red Cross document?

22 JUDGE SMITH: Yes.

23 MR. LEWALD: I would like to inquire of the Panel
24 as to the origin and the development of that document.

25 JUDGE SMITH: The document in question is

1 Attachment S to the Panel's testimony. It's American Red
2 Cross document 3074 of August '76, January '79 printing
3 entitled "Regulations and Procedures of American Red Cross
4 Disaster Services".

5 MR. DIGNAN: If Your Honor will recall, I
6 interrogated Mr. Donovan on this document.

7 JUDGE SMITH: No, I don't recall.

8 MR. DIGNAN: Yes.

9 JUDGE SMITH: Yes, I do recall.

10 MR. DIGNAN: You will recall that the issue came
11 up when Mr. Donovan was being cross-examined on whether or
12 not there was a limit of a thousand people in a congregate
13 care center. And Mr. Traficonte, harping on a memorandum
14 that Mr. Donovan had written, was making that into a
15 - regulation of the Red Cross.

16 And you will recall on my examination of Mr.
17 Donovan, I asked him whether that thousand as it appeared in
18 his memo was something that was in Red Cross regulations.
19 I'm paraphrasing obviously here. Or was it something that
20 the Red Cross person who had worked with him on that
21 memorandum gave him orally. And he said orally. And then I
22 showed him this, and he acknowledged that this was a set of
23 Red Cross regulations.

24 And if you will recall, I brought out the fact
25 that the thousand limit doesn't appear in this document.

1 That, rather, all of the congregate care center numbers are.
2 per square foot type numbers with no absolute limit of a
3 thousand.

4 So the document has been examined on with respect
5 to Mr. Donovan. I throw that in just so everybody is aware
6 of it.

7 MR. TRAFICONTE: Well, I'm not sure exactly of
8 what was just thrown in.

9 MR. DIGNAN: Well, Donovan has identified it as
10 the Red Cross regs.

11 MR. TRAFICONTE: Well, that's what I thought was
12 thrown in. But I recall that exchange. It was in fact
13 represented by Mr. Dignan --

14 MR. DIGNAN: Take a good hard look at it.

15 -- MR. TRAFICONTE: I don't have the transcript in
16 front of me, but I remember the document was held up and a
17 representation was made that it wasn't attachment to
18 Appendix 6.

19 MR. DIGNAN: No. Mr. Traficonte --

20 MR. TRAFICONTE: Let me finish.

21 MR. DIGNAN: Exactly the opposite, Mr. Traficonte,
22 because I didn't know it was. And that's why I asked him
23 the preliminary question if this is the place where it would
24 appear, and he said "yes".

25 JUDGE SMITH: All right. The examination of Mr.

1 Donovan was, as I recall it, as you stated, where did the
2 idea of a thousand people come from.

3 MR. TRAFICONTE: It came from a letter that is
4 marked and admitted that Mr. Donovan had written to various
5 state agencies, I believe, in the western part of
6 Washington.

7 JUDGE SMITH: Right.

8 MR. TRAFICONTE: That summarized his understanding
9 of Red Cross standards for congregate care shelters.

10 JUDGE SMITH: And Mr. Dignan was pointing out to
11 Mr. Donovan that he did not get that information from --

12 MR. TRAFICONTE: From this.

13 JUDGE SMITH: From this document.

14 MR. TRAFICONTE: Well, I think the purpose, if I
15 remember --

16 MR. DIGNAN: I've got the testimony in front of
17 me.

18 MR. TRAFICONTE: Well, good.

19 MR. DIGNAN: And it's a transcript 19187 through
20 19189.

21 MR. TRAFICONTE: Could we have a day? I think by
22 chance I happen to have it.

23 MR. DIGNAN: Yes. It's April 13th.

24 And when you look at it, what I did is, because
25 this thousand came up, I said -- my question to Mr. Donovan,

1 and it was preliminary is very simple. "Where did you get
2 the thousand? Did that come out of a Red Cross criteria or
3 from some conversation with somebody?"

4 Donovan: "It came from Mr. Balnicky, who was the
5 Red Cross employee."

6 You will recall he testified that he had put that
7 memo together in conjunction with a Red Cross employee.
8 This is the Donovan memo.

9 And then we went on from there, and I said, "I
10 have reviewed a document entitled 'Regulations and
11 Procedures of the American Red Cross Disaster Services'
12 which I at least understand is the document that people look
13 to for these criteria. Is that your understanding also?"

14 Mr. Donovan: "Yes."

15 "And I'm going to put it on front of you, and I
16 confess I can't find the 1,000 number. I find 40 square
17 feet. I find per person numbers." It went on, and I
18 brought out it was Balnicky.

19 And Donovan said, "That's correct. Since he's a
20 Red Cross employer, I collaborated with him in the
21 construction of the words of that paragraph. Again, it was
22 for planning purpose. That's the reason I wrote the
23 letter."

24 And then I asked him if it was possible that he
25 was giving you a working number as^{*} opposed to something

1 official of the Red Cross. There was an objection. You
2 overruled the objection. I withdrew the question. I don't
3 know why I withdrew the question if you overruled the
4 objection, but apparently I did.

5 And then I said, "Let me ask you this. Is the
6 document that I have put in front of you, is that in fact
7 the Red Cross criteria that one would look at for that kind
8 of a number? Are you confident of that?"

9 Answer: "Yes, I am."

10 And then I said, "I don't need to go any further".
11 I advised the Board that this would be coming in as
12 Attachment S to Rebuttal 6. So, you know, there is no doubt
13 that what I had in front of him.

14 MR. TRAFICONTE: Just the page on that last
15 question and answer?

16 MR. DIGNAN: 19190.

17 And I'll go back to the back room. I'm just
18 bringing up that Attachment S has been brought up and
19 examined on in this case and has been identified by Mr.
20 Donovan, as I understand it, as the Red Cross regs.

21 JUDGE SMITH: Well.

22 MR. TRAFICONTE: Well, I don't think so.

23 JUDGE SMITH: He's identified it as the document
24 as to which, in his role, he regards as Red Cross regs and
25 acts accordingly.

1 MR. DIGNAN: Right.

2 JUDGE SMITH: Which is okay. I'm not saying.
3 We're waiting for your arguments, but --

4 MR. TRAFICONTE: Well, we are going to challenge
5 the authenticity of the document as we did yesterday.

6 JUDGE SMITH: You are.

7 MR. TRAFICONTE: And I understand what Mr. Dignan
8 has stated, and I've got the question and answer in front of
9 me. I'm not sure that the question and the answer to Mr.
10 Donovan, assuming that Mr. Donovan could authenticate the
11 document, was even designed to do that.

12 It was a question, and I'll read it too. It's on
13 19190. "Is the document that I have put in front of you"
14 which of course had been minutes before described by Mr.
15 - Dignan to be what it purports to be.

16 MR. DIGNAN: No, no, I hadn't. That what I keep
17 saying. I did it in two places, Mr. Traficonte.

18 MR. TRAFICONTE: You read that, Mr. Dignan.

19 MR. DIGNAN: No. There were two places where I
20 identified it here. One was, I said, I understand it to be.
21 Do you also. And he said, yes. And then I put it to him a
22 second time on 19190.

23 MR. TRAFICONTE: Well, if you look at 19188, you
24 said: Question: "I have reviewed it," "I have reviewed a
25 document --

1 MR. DIGNAN: Right.

2 MR. TRAFICONTE: -- "...entitled 'Regulations and
3 Procedures of the American Red Cross Disaster Services'
4 which I at least understand is the document that people look
5 to for these criteria."

6 MR. DIGNAN: And then what did I say?

7 MR. TRAFICONTE: "Is that your understanding
8 also?"

9 MR. DIGNAN: And what did he say?

10 MR. TRAFICONTE: "Yes."

11 MR. DIGNAN: Yes. I call that identify the
12 document, wouldn't you?

13 The record will show pause.

14 MR. TRAFICONTE: That's a rare enough event, I
15 - guess.

16 Well, I don't think this is an authentication. I
17 don't think Mr. Donovan in these questions can authenticate
18 --

19 JUDGE SMITH: The issue at that time was almost an
20 assumption that, assuming this is genuine, is this -- he was
21 not put through a process of identifying that this
22 particular Attachment S is genuine. And they are raising
23 that objection.

24 MR. DIGNAN: Well, wait a minute. (C)

25 JUDGE SMITH: Now --

1 MR. DIGNAN: Before we -- we went too fast on
2 that, Your Honor. Then I would ask the Board to take a
3 very, and maybe the answer is going to be taken care of by
4 my partner's inquiry anyway of the Panel.

5 However, I think, Your Honor, you would want to
6 read the full context. This came up because the assertion
7 was that there was a Red Cross rule of a thousand. They
8 took it out of the Donovan memo. And what I was trying to
9 establish is that the Donovan memo wasn't based in fact on
10 the Red Cross regs.

11 JUDGE SMITH: I know.

12 MR. DIGNAN: So it was very definitely in my
13 interest to establish these were the regs. And I put the
14 question to him twice, and twice he did.

15 -- Now, if you want to say Donovan can't authenticate
16 a Red Cross reg, that may be.

17 JUDGE SMITH: I'm not saying that.

18 MR. DIGNAN: But he authenticated it.

19 JUDGE SMITH: I'm saying that at the time the
20 authenticity of the document was a minor point. The major
21 point is where did he get the number.

22 MR. DIGNAN: I understand your point. I was
23 not --

24 JUDGE SMITH: If the authenticity of that document
25 had been raised at that time, then you would have had to go

1 a lot farther. You would say, have you seen this document
2 before. Have you relied upon it in your business? How long
3 have you been relying upon it? Is it a standard work in
4 your profession? That's what you would have had to do. But
5 you can't. You just whipped it right by there before
6 anybody even noticed.

7 MR. DIGNAN: That was one time when I wasn't
8 stepping.

9 JUDGE SMITH: So I think that when there is a
10 discrete direct challenge to the authenticity of a document,
11 I think we are going to have to hear what the parties have
12 to say even though I agree with you for the purpose of that
13 answer he did recognize that that's where the answer would
14 be found if it were. You know, that's where he would look
15 - to for such information.

16 Okay, now, what do you want to do?

17 MR. TRAFICONTE: I was going to examine the panel
18 as to the genesis of this exhibit. And while no member of
19 the panel is a member of the management of the American Red
20 Cross, we think we have sufficient information that makes it
21 reliable that the document is a document of the Red Cross,
22 which I would like to present.

23 JUDGE SMITH: All right.
24
25

1 VOIR DIRE EXAMINATION

2 BY MR. LEWALD:

3 Q Mr. Sinclair, are you familiar with the document
4 which is attached to Applicants' Rebuttal Testimony No 6 and
5 marked as Attachment S, which is 27 pages?

6 A (Sinclair) I am.

7 Q And can you tell us when you first saw that
8 document?

9 A (Sinclair) It was in the fall of 1988, September,
10 October time frame.

11 Q And what was the occasion?

12 A (Sinclair) In the process of preparing research
13 for this testimony, I inquired of the New Hampshire Yankee
14 planners as to where they obtained the criteria for
15 determining congregate care space. And I was advised that
16 it came from the American Red Cross regulations, and I asked
17 for a copy.

18 At the same time I was advised that two of the New
19 Hampshire Yankee planners had been certified as American Red
20 Cross shelter managers. And I asked for whatever
21 documentation produced that certification.

22 In both instances I was provided with a copy of
23 what is known as 3074, American Red Cross Disaster Services
24 Regulations and Procedures, the Attachment S referred to
25 here.

1 I had a question similar to the one raised
2 yesterday. The date on it is 1976. Is there not a more
3 recent version of this available? And then in perusing
4 that, I contacted Mr. Donald Connors, who is the American
5 Red Cross liaison through FEMA Region 1 office here in
6 Boston, and asked if there wasn't a more updated version of
7 this.

8 Mr. Connors checked with his office, called me
9 back and said, what you have is what's currently available.
10 The Red Cross is in the process of recodifying their rules
11 and regulations, but the material is at the printer. And he
12 advised me that as soon as the new version was available he
13 would be happy to send it to me. But he assured me that
14 this is the current regulation.

15 Q Did you inquire as to the contents of what is
16 Attachment S and what might be sent to the printers by the
17 Red Cross?

18 A (Sinclair) I did so. I was concerned that the
19 recodification might involve some change in the standards
20 that are contained in the rules and regulations. And I was
21 advised that that was not the case. That there would be no
22 change, at least in the standards that we were concerned
23 with, the 40 square feet per person requirement.

24 MR. LEWALD: That concludes our testimony on the
25 reliability, if you will, or the authenticity of the

1 document.

2 If necessary, and I would rather hope that it
3 wouldn't be, we of course can and will bring in a Red Cross
4 management person who can identify the document.

5 JUDGE SMITH: You still have genuine concerns
6 about the authenticity of it?

7 MR. TRAFICONTE: The concerns we have are exactly
8 the concerns that Mr. Sinclair expressed with regard to the
9 timeliness of the document. And I would just want to follow
10 up.

11 JUDGE SMITH: Well, why don't we do this. Do you
12 think it is going to be resolved by your examination to your
13 satisfaction?

14 MR. TRAFICONTE: It might be resolved in answer to
15 one question.

16 JUDGE SMITH: Okay.

17 CROSS-EXAMINATION (Continued)

18 BY MR. TRAFICONTE:

19 Q You had this conversation with Mr. Connors, I take
20 it, in November of 1988, at which point he told you that a
21 more recent updated version of these regulations is at the
22 printer?

23 A (Sinclair) He indicated it would be available
24 this spring. I have not seen it as yet.

25 Q The short of it is, are you aware as you sit here

1 today whether it's available now or not?

2 A (Sinclair) I believe it is available now.

3 MR. TRAFICONTE: If it's available now, I don't
4 think we should have this -- I don't think 13-year old
5 regulations should be marked and admitted. If the Red
6 Cross has new regulations --

7 JUDGE SMITH: Okay. You want to get it, we'll
8 move on. If you want to get it and put it in here, that's
9 all right.

10 MR. LEWALD: We can, Your Honor. If there is no
11 change, I don't know the significance of it.

12 JUDGE SMITH: Is that what he testified to?

13 MR. TRAFICONTE: He testified as to one item which
14 was the 40 square feet per person, that there was no charge.
15 Can we just follow that up?

16 JUDGE SMITH: Well, I'll tell you what. Over the
17 two-week break get it, look at it, and then work it out. If
18 it's not available, then we'll come back to it.

19 MS. TALBOT: I have a few questions, Your Honor,
20 on the Red Cross issue.

21 Perhaps I should have said this to the panel
22 yesterday, but I'll address my questions to the entire
23 Panel and then whichever one of you feels best able to
24 answer it, please do. And to the extent that I have any
25 question that's addressed to one person in particular, now

1 that I know where the names go with the faces, I will
2 address the question as so.

3 Some preliminary questions first.

4 CROSS-EXAMINATION (Continued)

5 BY MS. TALBOT:

6 Q The SPMC recognizes that there is no planning
7 between New Hampshire Yankee and the Red Cross with respect
8 to a radiological emergency at Seabrook, correct?

9 A (Callendrello) That is correct. That there is
10 no -- the SPMC recognizes that the American Red Cross has
11 taken a position that they will not be able to plan with New
12 Hampshire Yankee. So the testimony indicates there was some
13 preliminary planning with one of the members of the American
14 Red Cross in certifying some of the congregate care
15 - shelters.

16 So with that exception, that is correct.

17 A (Sinclair) The absence of that planning
18 cooperation is confined in the Massachusetts chapter to the
19 American Red Cross.

20 Q Okay. And the SPMC also recognizes that there is
21 no planning between American Red Cross and state and local
22 governments in Massachusetts with respect to a radiological
23 emergency at Seabrook, correct?

24 A (Sinclair) Could you restate that?

25 Q The SPMC also recognizes that there is no planning

1 between American Red Cross and state and local governments
2 in Massachusetts with respect to a radiological emergency at
3 Seabrook.

4 A (Callendrello) I don't agree with that statement,
5 no.

6 Q Can you tell me why, Mr. Callendrello?

7 A (Callendrello) Part of it is in the answer to
8 interrogatories that we received from the Commonwealth. And
9 that is, in the Massachusetts civil defense activities it
10 was indicated that Massachusetts civil defense would contact
11 the American Red Cross in the event of an emergency at
12 Seabrook Station.

13 I believe it also indicated that civil defense
14 would coordinate with American Red Cross. And I know that
15 there is a pre-established arrangement between the
16 Commonwealth and the American Red Cross as it relates to
17 other power plants and other types of emergencies.

18 Q So, in other words, it's a fair statement then
19 that besides contacting and coordination, which happened in
20 the ordinary course anyway, in any pre-established links
21 that already exist, beyond that there has been, in your
22 understanding, no planning between American Red Cross and
23 state and local governments in Massachusetts for a
24 radiological emergency at Seabrook?

25 A (Callendrello) It's difficult to separate out the

1 planning for Seabrook Station and the planning for other
2 types of emergencies.

3 As I said, the interrogatory responses are there.
4 I know the comprehensive emergency response plan has got a
5 section on the American Red Cross' response and coordination
6 with the Commonwealth. In fact, I have seen some documents
7 that I guess were provided by the Town of Amesbury that
8 indicate that the American Red Cross is involved, for
9 example, with special needs support.

10 None of that has the label Seabrook Station on it
11 with the exception of the interrogatory response. But it
12 all would be the type of planning that could be applicable
13 in the event of a Seabrook emergency.

14 Q Isn't it a fact that American Red Cross does
15 engage in radiological-specific planning for nuclear power
16 plants in which there is no problem with governmental
17 nonparticipation?

18 A (Callendrello) Yes, that's true.

19 Q So isn't it a fact that, with respect to planning
20 for radiological site-specific emergencies, there has been
21 no such planning because of the lack of state and local
22 participation?

23 A (Callendrello) With the exceptions that I have
24 indicated before, that's correct.

25 Q In other words, with the overall exceptions of the

1 contact and coordination in pre-established links.

2 A (Callendrello) And as I indicated, the two
3 congregate care centers that were reviewed and certified by
4 the Red Cross representative.

5 Q Who was the Red Cross representative that
6 certified those?

7 A (Callendrello) Mr. Saydlowski.

8 Q Aside from the two congregate care centers that
9 Mr. Saydlowski apparently helped New Hampshire Yankee to
10 designate, isn't it a fact that New Hampshire Yankee has
11 taken it upon itself to find the rest of the congregate care
12 centers?

13 A (Callendrello) That is correct.

14 Q And am I correct in understanding that the people
15 who certified the congregate care centers were all employees
16 of New Hampshire Yankee?

17 A (Callendrello) They were either direct employees
18 or employees of a contractor assigned to New Hampshire
19 Yankee as part of the loaned employee agreement.

20 Q So they were paid either directly or indirectly by
21 New Hampshire Yankee?

22 A (Callendrello) That is correct.

23 Q For their services in designating and procuring
24 congregate care centers?

25 A (Callendrello) For more than that, but it

1 included those duties.

2 Q Isn't it a fair statement to say that --

3 JUDGE SMITH: Excuse me. Your question for
4 procuring and designating. You mean certifying?

5 MS. TALBOT: Yes, Your Honor. Thank you for that
6 clarification.

7 JUDGE SMITH: Well, then what is the answer?

8 MS. TALBOT: Let me step back a little bit.

9 BY MS. TALBOT:

10 Q Isn't it a fact that certifying a congregate care
11 center would entail designating that center, finding it and
12 procuring it for use?

13 A (Sinclair) Certification is a function of meeting
14 the Red Cross standards for a congregate care facility.
15 Procuring the building was a contractual agreement between
16 New Hampshire Yankee and the building owner if that
17 distinction helps you.

18 Q So the people who both procured -- let me just
19 take this one bit at a time so I don't give you a big
20 compound question.

21 The people who procured the congregate care
22 centers were employed either directly or indirectly by New
23 Hampshire Yankee?

24 A (Callendrello) Yes, that's true.

25 Q Similarly, the people who ultimately certified the

1 congregate care centers, having taken the Red Cross course,
2 as I understand it, were also either directly or indirectly
3 employed by New Hampshire Yankee?

4 A (Callendrello) That's true with the exception of
5 those two that were certified by the Red Cross
6 representative.

7 Q Okay.

8 MS. TALBOT: Is that clear for you, Your Honor,
9 more clear?

10 JUDGE SMITH: Yes.

11 BY MS. TALBOT:

12 Q Isn't it a fair statement then to say that aside
13 from the procurement and certification of the congregate
14 care centers New Hampshire Yankee has taken no other
15 compensatory measure with respect to American Red Cross
16 nonparticipation?

17 A (Callendrello) No, that's not true.

18 Q Could you describe for me, Mr. Callendrello, what
19 other compensatory measures have been taken?

20 A (Callendrello) We have established arrangements
21 through the American Red Cross representative in New
22 Hampshire, a pre-arrangement such that that individual would
23 be our contact in the event of an emergency, and would serve
24 as the link to, or could serve as the link to the American
25 Red Cross in the event we need to activate their services to

1 support an emergency response.

2 Q Is that it? Are there any other compensatory
3 measures besides that one?

4 (The witnesses confer.)

5 A (Callendrello) That's it. I was just checking
6 with Mr. Sinclair. But that's all we can think of right
7 now.

8 Q You mentioned in your previous answer that the New
9 Hampshire Red Cross could serve as a link.

10 What do you mean by "could serve"?

11 A (Callendrello) Procedurally they are our link
12 with the American Red Cross in the event of an emergency
13 response.

14 Q Is it a fair statement to say then that it
15 - wouldn't be appropriate for New Hampshire Yankee to directly
16 activate the American Red Cross?

17 A (Callendrello) No, that would not be fair to say.

18 Q Yet, it would be inappropriate for New Hampshire
19 Yankee to be the link.

20 A (Callendrello) No, that's not what I'm saying.

21 Q Can you tell me what you are saying?

22 A (Callendrello) I'm saying that as a planned
23 arrangement, we have established a link through the New
24 Hampshire American Red Cross.

25 As is clear in the letter that was sent from Mr.

1 Brown of the Red Cross to Mr. Brown of New Hampshire Yankee,
2 the Red Cross fully intends to respond to an emergency at
3 Seabrook Station, or in the vicinity of Seabrook Station.

4 We have had to establish, because of the
5 difficulty in planning with the Red Cross in Massachusetts,
6 we have had to establish that procedural link with the Red
7 Cross through another means. And that is through the New
8 Hampshire American Red Cross.

9 Q So in other words, you've established contact and
10 coordination and pre-established procedures by way of New
11 Hampshire Yankee -- I mean, by way of New Hampshire Red
12 Cross.

13 A (Callendrello) That is correct.

14 Q And no other compensatory measures have been
15 taken, to your knowledge, other than contact and
16 coordination efforts?

17 A (Sinclair) I'm not clear on what you mean by
18 additional compensatory action.

19 The activation of a Red Cross requires essentially
20 notification. And that notification link is contained in
21 the existing SPMC procedures through the New Hampshire
22 Chapter.

23 Q Fine. I think my question has been answered. I
24 just wanted to make sure before I went on that there wasn't
25 anything else.

1 What assurance --

2 JUDGE SMITH: Wait a minute. I'm not sure that
3 your question has been answered.

4 What was your question and answer just before
5 that? Your question just before this one.

6 MS. TALBOT: I asked Mr. Callendrello if there
7 were any compensatory measures other than the procurement
8 and certification of congregate care centers that New
9 Hampshire Yankee had taken in the absence of American Red
10 Cross participation. And he said -

11 JUDGE SMITH: I just didn't hear you ask it that
12 completely, so that's fine.

13 MS. TALBOT: I'm trying not to be compound. Maybe
14 I should.

15 JUDGE SMITH: See, there was an identification of
16 several so-called compensatory actions. In your wind-up
17 question you didn't list them all, but I think you have now.

18 MS. TALBOT: Thank you, Your Honor.

19 JUDGE SMITH: All right, now, just for
20 completeness list all the compensatory actions that you say
21 none other that have been taken so that your point is clear.

22 MS. TALBOT: Okay.

23 The procurement and certification of congregate
24 care centers and the establishment of pre-established
25 procedures dealing with contact and coordination with New

1 Hampshire American Red Cross to serve as a link with the
2 nonparticipating Massachusetts American Red Cross.

3 (The witnesses confer.)

4 JUDGE SMITH: This is in the context of measures
5 compensating for the failure of the Massachusetts Chapters
6 to participate in planning.

7 Have you done anything else to compensate for that
8 fact, that situation?

9 THE WITNESS: (Sinclair) Your Honor, at the risk
10 of confusing the situation any more, I think what threw the
11 panel was the word "compensation".

12 There is no need to compensate beyond that. A
13 simple notification of the American Red Cross in any
14 location at any level triggers the national disaster
15 response.

16 JUDGE SMITH: That's for a response. That's for a
17 response.

18 THE WITNESS: (Sinclair) Correct.

19 JUDGE SMITH: Her question pertains to planning.

20 THE WITNESS: (Sinclair) I see.

21 BY MS. TALBOT:

22 Q Just to be clear, too, so I understand the
23 linkage, New Hampshire Red Cross links up with American Red
24 Cross in general, correct?

25 I said Massachusetts Red Cross earlier, and I may

1 have been misquoting you.

2 A (Sinclair) That is correct.

3 Q Okay, thank you.

4 Gentlemen, what assurance do you have that
5 American Red Cross volunteers will be adequate in number?

6 A (Callendrello) As we indicated in our testimony,
7 the American Red Cross in Massachusetts has a number of
8 chapters -- I think it's something on the order of 60
9 chapters throughout the Commonwealth -- that we would expect
10 personnel to come from to assist in staff the congregate
11 care centers.

12 Q Would you make amendments to the plan if you were
13 to find out that despite Red Cross' willingness to respond
14 adequate staffing could not be guaranteed in a timely
15 --manner?

16 A (Sinclair) No.

17 Q In other words, you would leave emergency
18 facilities unstaffed to the degree that American Red Cross
19 was unable to accommodate them?

20 A (Sinclair) I know of no reason why they would be
21 unable to staff it.

22 A (Callendrello) Part of the problem with the
23 hypothetical is there is a number of undefined terms in
24 there in terms of quantity. You said "sufficient staff", I
25 believe, and "timely manner".

1 We would -- if timely means that the facilities
2 are not ever opened, we would obviously need to make some
3 further compensatory, take some further compensatory action.
4 But assuming timely has got some bound that's reasonable and
5 the local or state chapter, in turn, could be compensated
6 for by its national chapter or adjacent state chapters, we
7 would not need to make any changes to the plan.

8 The American Red Cross is an interlocking network
9 of local, state, interstate and national organizations, or
10 chapters.

11 Q Again, if you were to find out that despite
12 American Red Cross' willingness to respond, for whatever
13 reasons in the universe of reasons that the adequacy of that
14 response couldn't be guaranteed, would you amend the plan?

15 A It's a hypothetical question. I realize, Mr.
16 Sinclair, that in your opinion it maybe borders on the
17 ridiculous, but nonetheless, it's my question.

18 MR. LEWALD: I'm going to object to the question.
19 The premise of the question is if something doesn't take
20 place, then what would you do. This is a plan that is set
21 up on certain assumptions and certain bases. And if you
22 were going to say assuming that you don't have half of the
23 plan, then what would you do. I mean it's a kind of open-
24 ended forever unending question if you are going to pursue
25 this.

1 MS. TALBOT: Your Honor, I have something from
2 the --

3 JUDGE SMITH: What's the basis for the
4 hypothetical?

5 MS. TALBOT: Your Honor, the next question I have
6 is I would like to read to the Panel a portion of the
7 transcript that pertains exactly to the adequacy of an
8 American Red Cross response in an emergency.

9 JUDGE SMITH: Okay.

10 MS. TALBOT: So the hypothetical was a foundation
11 for reading this into the record.

12 BY MS. TALBOT:

13 Q Panel, I would like to read to you a portion of --

14 JUDGE SMITH: There was no answer to your
15 --hypothetical question.

16 MS. TALBOT: Oh. Well, Mr. Sinclair said, no, he
17 wouldn't amend the plan.

18 JUDGE SMITH: Oh, did he?

19 MS. TALBOT: And then I said --

20 MR. LEWALD: I didn't --

21 MS. TALBOT: I think if we have Donna play it back
22 at one point Mr. Sinclair said he wouldn't, if you can
23 change your mind.

24 THE WITNESS: (Sinclair) I rejected the
25 hypothesis.

1 MS. TALBOT: Oh, I see. All right.

2 Can Your Honor direct the witnesses to answer the
3 question?

4 JUDGE SMITH: I give them the question and clearly
5 state what the hypothesis is.

6 BY MS. TALBOT:

7 Q The hypothesis is that you found out that you
8 can't rely on American Red Cross to give you an adequate
9 number of volunteers.

10 Would you amend the plan, i.e., would you provide
11 for more staff people, more ORO staff people?

12 A (Callendrello) Not necessarily. And there is two
13 components of that. And one is legal, and I don't quite
14 understand all the legal presumptions. And that has to do
15 with best efforts. That may be one of the activities that
16 we could rely on the Commonwealth to support through the
17 extensive organization that exists to respond to other
18 emergencies.

19 If the Red Cross became no longer available for
20 some reason as a resource to us, we would have to change the
21 plan to show some other resource to staff or management
22 congregate care centers.

23 Q By the same token, if the Red Socks -- if the Red
24 Socks --

25 A (Callendrello) That would be a good resource.

1 (Laughter)

2 MS. TALBOT: I'm thinking about next week.

3 BY MS. TALBOT:

4 Q By the same token, if the Red Cross were deemed
5 not necessarily unavailable, but simply not as large in
6 number as you would require, I take it then that you would
7 have to change the plan in order to compensate for that too.

8 Just understand that my hypothetical doesn't
9 entail no Red Cross at all.

10 A (Callendrello) Right, I understand that.

11 Yes, it would require some further considerations.
12 It may not require changing the plan in terms of the
13 functions and the logic of the plan, but it may require say
14 some additional notifications or some additional reliance on
15 - the Commonwealth.

16 Q So in other words, you would rely on certain
17 people from the Commonwealth to staff various emergency
18 facilities.

19 A (Callendrello) Well, I'm saying that as I sit up
20 here now that would be one of the ways I could see solving
21 that problem. There are a number of other ways. I know
22 we've got a lot of planners that can come up with other ways
23 of solving these kinds of problems. Some of them may be
24 solvable by the Red Cross themselves.

25 It's typical that the Red Cross would recruit

1 volunteers at the time of an emergency. And it may not be a
2 problem at all.

3 Q I would like to read to the Panel a portion of
4 testimony by a Mr. Clark, who is the civil defense director
5 in the Town of Amesbury.

6 MS. TALBOT: For the record, this is --

7 MR. LEWALD: I'm going to object to this, Your
8 Honor. What Mr. Clark's view of the Red Cross and his
9 experience is, he's already testified to and really just to
10 have it read into the record at this point serves no
11 purpose.

12 MS. TALBOT: Your Honor, if I may?

13 I think it's a very important point. Mr. Clark
14 was certainly not our witness, and he testified on the
15 record that, in his experience, there were not enough Red
16 Cross volunteers. That he had to, you know, man these
17 emergency centers by himself and with whoever he could
18 muster up from the town.

19 And I think that the plan's passive reliance on
20 the adequacy of the Red Cross response, unbuttressed by any
21 other compensatory measure other than some paper
22 communication links, really bears watching here. And I
23 think that if the panel, maybe they weren't here the day Mr.
24 Clark testified, but maybe if they could see that it isn't a
25 given and it isn't carved in stone that the Red Cross is

1 always going to be there in the numbers that you need.

2 Understand that I'm not taking issue with the fact
3 that Red Cross would respond. That's a given. But it's
4 really the adequacy of that response that has come to
5 question, in large part as a result of Mr. Clark's direct
6 experience.

7 JUDGE SMITH: Well, you can proceed. You can ask
8 them if they heard Mr. Clark. Or if they haven't, tell them
9 who Mr. Clark is and what he said and ask them if that
10 changes their judgment. And you can also give them what Mr.
11 Clark said and ask them if that on their own, aside from Mr.
12 Clark's judgment, on their own does that change their -- do
13 the facts stated in Mr. Clark's testimony change their
14 opinion any.

15 -- MR. LEWALD: Change their what, Your Honor?

16 JUDGE SMITH: Opinion any. As to what, I don't
17 know. She's going to have to clarify it.

18 There is two ways that she can get Mr. Clark in.
19 One, by the ideas expressed by Mr. Clark aside from the fact
20 that it was Mr. Clark who expressed them.

21 Two, because of Mr. Clark and whatever status he
22 may have had, would that influence these experts to change
23 their judgment.

24 Two ways. Either way is a permissible approach,
25 at least for her to start out. She is not getting Mr.

1 Clark's testimony in again. She is putting it to these
2 people for whatever influence it may have upon their views.

3 MR. LEWALD: I think they have to have a few to
4 first examine.

5 JUDGE SMITH: Well, then that's another objection
6 then, isn't it?

7 MR. LEWALD: As it's coming now, it's just pure
8 argument really.

9 JUDGE SMITH: Well, something has to come first.
10 Let's put the testimony on the table and see what view she
11 wants to test by that Clark testimony.

12 BY MS. TALBOT:

13 Q I'll read you the portion of the transcript on
14 page 16864, lines 3 to 24, where Mr. Clark summaries his
15 - experience in dealing with Red Cross during an emergency.
16 Bear in mind that Mr. Clark was not our witness.

17 MR. LEWALD: I'm going to object to this.

18 JUDGE SMITH: Now wait a minute.

19 MR. LEWALD: These preparatory remarks, Your
20 Honor. Either she asks the question --

21 MR. DIGNAN: He was your witness.

22 MR. LEWALD: -- or it doesn't ask the question,
23 but the run on before the question comes, I think is
24 misleading.

25 JUDGE SMITH: Well, this Panel is unlikely to be

1 misled by it, I don't think

2 MR. LEWALD: I might be misled.

3 But the record is going to be misled, I think,
4 unless we know when the question starts and when it doesn't
5 start.

6 JUDGE SMITH: Right. I think that's a fair
7 complaint, Ms. Talbot.

8 MS. TALBOT: Okay.

9 Just off the record, Your Honor?

10 (Discussion off the record.)

11 MS. TALBOT: Thanks.

12 BY MS. TALBOT:

13 Q This is Mr. Clark, this is his testimony.

14 "I've had particular experience with the Red
15 - Cross. I had the night of the fire at the Johnson Matthew
16 plant in Seabrook, which I would up helping coordinate the
17 effort up there that night, along with Norm Brown, the civil
18 defense director from the Town of Seabrook. We moved people
19 to the dog track. I wound up manning that place all night
20 long because X chapter could not provide, or didn't provide
21 people. I've got a serious problem with the Red Cross in
22 our area as far as available personnel.

23 "That does not say I'm an expert if they are able
24 to provide them. They could get them from other places. I
25 have no knowledge of that. That's not my expertise."

1 Question: "You just had some trouble on that one
2 occasion?"

3 Answer: "More than one occasion. Same reason
4 like I stated during the hurricane or whatever, that I have
5 to augment the personnel to run the shelters."

6 Question: "Do you know in those occasions if the
7 American Red Cross chapter determined whether or not it was
8 necessary for them to augment?"

9 Answer: "They determined that there just weren't
10 available people."

11 So does this change your view in any way in terms
12 of the reliability of a Red Cross response?

13 A (Callendrello) No, it doesn't.

14 Q Isn't it a fact that there are no ORO personnel
15 designated to fill in in the event that Red Cross would
16 somehow be unable to muster enough volunteers?

17 A (Callendrello) That's not true. There are no ORO
18 personnel designated to staff congregate care centers. But
19 there are a number of ORO personnel that could become
20 available once their primary duties are fulfilled.

21 MS. TALBOT: Could I have one moment, Your Honor?

22 (Counsel confer.)

23 BY MS. TALBOT:

24 Q Have you made any inquiry as to the availability
25 of American Red Cross staff people or volunteers in

1 Massachusetts?

2 A (Callendrello) We have made inquiries as to the
3 timing of the availability of American Red Cross people as
4 we indicated in interrogatory responses.

5 Q Mr. Callendrello, what do you mean by timing?

6 A (Callendrello) You asked us the question, I
7 believe, something along the lines of how quickly could the
8 American Red Cross begin to staff the, I think it was the
9 host special facility, and then how quickly could we staff
10 the other congregate care facilities.

11 I'm sorry, how quickly could the American Red
12 Cross staff the other congregate care facilities.

13 Q Am I correct in understanding that the same Red
14 Cross that responded to the Johnson Matthew plant in
15 Seabrook would have been working under the same procedures
16 as the Red Cross that would respond in a radiological
17 emergency at Seabrook?

18 A (Callendrello) I don't know. I don't know what
19 chapter responded to the Johnson Matthew fire. Maybe Mr.
20 Sinclair does.

21 A (Sinclair) I believe Mr. Clark is referring to
22 the Exeter Chapter out of Exeter, New Hampshire.

23 Q Do you have any basis, other than reliance on Red
24 Cross' procedure, that in fact there are Red Cross in the
25 vicinity of the EPZ adequate in number?

1 A (Callendrello) Well, keep in mind the congregate
2 care centers are not within the EPZ. They are located
3 outside the EPZ.

4 Q In or around the EPZ. Excuse me.

5 A (Callendrello) I'm sorry, I lost the question.

6 Q What basis that the Red Cross in the vicinity in
7 and around the EPZ has adequate personnel?

8 MR. LEWALD: Do you understand the question?

9 THE WITNESS: (Sinclair) There is no reliance on
10 the American Red Cross within the EPZ. This is reliance
11 upon chapters outside of the EPZ to house people once an
12 evacuation is done.

13 I think where we rely on the Red Cross capability
14 to respond goes to the Red Cross' congressional mandate to
15 respond, as Mr. Brown has indicated to us that it will do.
16 It will do whatever it can do, whatever it is required to do
17 in order to fulfill that mandate.

18 BY MS. TALBOT:

19 Q It will do whatever it is able to do, wouldn't you
20 agree?

21 A (Callendrello) That's correct.

22 Q But wouldn't you agree that the Red Cross
23 volunteers in the example I just read you did whatever they
24 were able to do?

25 A (Callendrello) I know what Mr. Clark's opinion

1 was of what happened. And I guess what I hear in his
2 testimony is maybe his criticism of the way the Red Cross
3 works. But it's my understanding that the Red Cross, as a
4 matter of its course of responding to an emergency, supplies
5 a number of people who are capable of managing a shelter.

6 In fact, one of their early duties is to try and
7 recruit additional volunteers at the time. In fact, recruit
8 from the evacuees themselves to assist in responding to the
9 emergency and in managing the congregate care facility.

10 Q So am I correct in understanding that the basis
11 for your belief that Red Cross will have adequate personnel
12 in whatever areas that are called upon to respond is from
13 their charter that Mr. Sinclair just cited to?

14 A (Callendrello) Their charter and their method of
15 operation and the fact that the Commonwealth relies on them
16 to respond to other emergencies.

17 Q Emergencies like the Johnson Matthew plant in
18 Seabrook.

19 A (Callendrello) Well, the Commonwealth did not
20 rely on them in that case. That was in New Hampshire.

21 JUDGE SMITH: What contention goes to the
22 adequacy, the quantitative adequacy of the American Red
23 Cross response?

24 MS. TALBOT: JI-54.

25 JUDGE SMITH: It does?

1 MS. TALBOT: Do you want me to continue, Your
2 Honor?

3 JUDGE SMITH: Yes, go ahead.

4 MS. TALBOT: Okay. I'm almost through with this
5 topic area.

6 BY MS. TALBOT:

7 Q Gentlemen, wouldn't you agree that there is a need
8 for medical assistance other than first aid to be made
9 available during emergencies?

10 A (Callendrello) Assuming we're talking about a
11 radiological emergency, the need for medical assistance -- I
12 don't understand the question. It just seems very broad to
13 me and I can't answer yes or not without more specificity.

14 Q Maybe I will just put it into parts.
15 - - Would you agree that a prudent planner would
16 provide for medical assistance to be made available to
17 evacuees during an emergency?

18 A (Callendrello) Again, assuming that we're talking
19 about evacuees located at a congregate care centers, yes.
20 In fact, I believe that's one of the items that the American
21 Red Cross indicates to their shelter managers that they
22 should try and make some personnel assignment for. And that
23 is, some kind of medical assistance.

24 JUDGE SMITH: You know, I read that contention not
25 to raise the quantitative response of the Red Cross, but to

1 point out that they are not planning and that an ad hoc
 2 response, as such, would not be adequate because of lack of
 3 planning. It has nothing to do with the resources, Red
 4 Cross resources, that I can see. That I can see, I don't
 5 know.

6 There is no objection. I just wanted my own
 7 guidance here.

8 MS. TALBOT: Well, Your Honor is certainly
 9 entitled to that.

10 Your Honor, do you want to see this?

11 JUDGE SMITH: No. There is no objection.

12 MS. TALBOT: Oh, I misunderstood you. Do you want
 13 me to --

14 (Counsel confer.)

15 MS. TALBOT: Your Honor, I just have a few more
 16 questions and I'll just wrap it up.

17 JUDGE SMITH: All right.

18 BY MS. TALBOT:

19 Q So, Mr. Callendrello, you said, correct me if I'm
 20 wrong, that, yes, you agreed that congregate care centers
 21 should have provision for some sort of medical assistance.

22 A (Sinclair) To the extent that the people who go
 23 to that congregate care facility require medical assistance,
 24 that would be true.

25 I think the question you have to ask is are we

1 proposing to put people into a congregate care situation who
2 require medical treatment.

3 Q Wouldn't you agree that as a matter of policy the
4 American Red Cross does not provide medical assistance other
5 than first aid?

6 A (Sinclair) To the extent that someone in a
7 congregate care situation requires medical assistance, the
8 Red Cross does provide it.

9 A (Callendrello) Just to clarify my answer to the
10 previous question. I misunderstood the question. I thought
11 you were talking about medical assistance at the congregate
12 care shelter for evacuees, meaning first aid, whatever type
13 of routine medical assistance might be required for an
14 evacuee or a large number of evacuees.

15 And to that, I was responding that, yes, the
16 American Red Cross recognizes the need and typically makes
17 arrangements to have some kind of a nurses station or first
18 aid station available in the shelter.

19 I didn't read your question or understand your
20 question to mean medical assistance as a continuing type of
21 medical assistance.

22 MS. TALBOT: That's all the questions I have for
23 this Panel, Your Honor.

24 I would point out that -- no excuse me -- for this
25 Panel on this particular issue. I think that it may be

1 more prudent to wait to bring up the other points after I
 2 meet with Mr. Dignan.

3 JUDGE SMITH: All right.

4 MR. TRAFICONTE: Before we do that, I want to just
 5 pursue one brief line with this panel on Attachment S, which
 6 we already had discussed. But I noted when I was sitting
 7 here that we might get some clarification right on the
 8 record right now as to the relevance and the authenticity --
 9 reliability, if you will, of Attachment S.

10 CROSS EXAMINATION (Continued)

11 BY MR. TRAFICONTE:

12 Q Could I direct the Panel's attention to Attachment
 13 Q to their testimony?

14 Attachment Q is the September 10, 1987 letter from
 15 Brown to Brown.

16 A (Callendrello) I have that.

17 Q Do you have that, Mr. Callendrello?

18 A (Callendrello) Yes, I do.

19 Q Could I direct your attention to the second page?
 20 And I would like to direct your attention to the top portion
 21 of the second page.

22 Do you see a reference to an ARC, American Red
 23 Cross document there?

24 A (Callendrello) Yes, I do.

25 Q And do you believe that, based upon this reference

1 and its description, that this in fact is a revised version
2 of Attachment S?

3 A (Callendrello) No, I do not.

4 Q You believe that there is another document then
5 entitled "Disaster Services Regulations and Procedures" that
6 is revised as of January of 1984. You believe that there is
7 another document that --

8 MR. DIGNAN: Look at the numbers.

9 MR. TRAFICONTE: Yes. Let me proceed.

10 BY MR. TRAFICONTE:

11 Q But you believe that there is another document
12 that may well contain information that overlaps or is at
13 least connected to the information provided in Attachment S.

14 A (Callendrello) Other than the sections that are
15 cited in the Red Cross letter, I'm not familiar with
16 American Red Cross 3003. There are a series of Red Cross
17 documents. In fact, there are --

18 Q There are a series of Red Cross documents?

19 A (Callendrello) There are two others referenced in
20 Attachment S.

21 A (Sinclair) If I may, Mr. Traficonte, if I may
22 perhaps clear up the confusion.

23 3074 was utilized for our purposes because it
24 contained the shelter standard requirements. 3003, as I
25 understand it, refers you to 3074 for the purposes of

1 defining what goes on in the shelter.

2 Q So let me just make sure I understand.

3 3074, Attachment S, is one set of regulations and
4 procedures of the American Red Cross.

5 A (Sinclair) It is a subset.

6 Q A subset of a series of regulations, each of which
7 perhaps have their own reprinting dates or their update
8 versions.

9 A (Sinclair) That's my understanding.

10 Q What is your understanding of what 3003 is? Is it
11 the over-arching?

12 A (Sinclair) It's a policy statement more or less,
13 and I believe part of it's quoted in the letter here below.

14 Q Yes, that I'm clear on. I was not clear that
15 there were subparts to this.

16 Is that your understanding, Mr. Sinclair?

17 A (Sinclair) My understanding is when I looked at
18 ARC 3003 for such specificity as the number of square feet
19 required in a shelter, 3003 referred me to 3074.

20 Q I understand.

21 And there are additional other subpart, disaster
22 service regulations and procedures. There may be.

23 A (Sinclair) I was told it's some three or four
24 inches high.

25 MR. TRAFICONTE: That isn't helpful as it turns

1 out, but I thought we in fact had a reference to a more
2 updated version.

3 MR. DIGNAN: It was helpful. It just didn't help
4 you. It was helpful to me.

5 JUDGE SMITH: All right, we're adjourned until
6 1:00 p.m. on May 15th in this room.

7 (Whereupon, at 11:15 a.m., the hearing was
8 recessed, to resume at 1:00 p.m., Monday, May 15, 1989.)

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of: Public Service Company of New Hampshire, et al. (seabrook Station Units 1 and 2)

Name:

Docket Number: 50-443-OL
50-444-OL (Off-site Emergency Planning)
Place: Boston, Massachusetts
Date: April 28, 1989

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

/s/ Donna L. Cook

(Signature typed):

DONNA L. COOK
Official Reporter
Heritage Reporting Corporation